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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 242

IVAN B. CARLSON, *Petitioner,*

v.

WILLIAM H. DICKMAN, HAROLD E. SALISBURY, LAWRENCE SMELSER and SCHOOL DISTRICT No. 62C, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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July 11, 1962

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Ivan B. Carlson, petitioner herein and intervenor in the proceedings below, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon entered in this case on November 15, 1961.[1]

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Oregon, dated November 15, 1961, is reported in 73

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[1] The respondents, in addition to those named in the caption, include Dale Jacobs, Sherman Washburn, Gene Bonniksen, Howard Klemsen and Laurin Hinman, each in his official capacity as director of the District School Board of School District No. 62C, and Edwin C. Ditto, in his capacity as clerk of School District No. 62C.

Ore. (Adv. Sh.) 645 and 366 P. 2d 533, and a copy is attached hereto as Appendix A. The unreported memorandum opinion of the Circuit Court for Clackamas County is attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered on November 15, 1961, and a timely petition for rehearing was denied on March 13, 1962. On June 5, 1962, Mr. Justice Douglas signed an order extending the time for filing this petition for a writ of certiorari to and including July 11, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

In 1941, the Oregon Legislature provided for the free use of secular text books by all children attending "standard" elementary schools, thereby including not only public schools but both religious and non-religious private schools meeting state educational standards. The questions presented are whether the Oregon Constitution, construed by the Supreme Court of the State of Oregon to compel the withdrawal of the free use of such secular textbooks by children attending Catholic schools meeting state educational standards, on the sole ground that "the teaching of the precepts of Catholicism is an inseparable part of the educational process" in such schools,

(a) Violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by establishing an invidiously discriminatory classification based solely on religion, and

(b) Violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution by imposing an educational and economic burden not only on the children who attend such Catholic schools but also on the parental and religious right of parents to select such schools for the education of their children, and

(c) Violates the First Amendment of the United States Constitution by imposing a financial burden on the exercise of the parents' religious right to select religiously-oriented schools for their children's education.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of Oregon, Article I, Section 5:

> "No money shall be drawn from the Treasury for the benefit of any religeous [sic], or theological institution, nor shall any money be appropriated for the payment of any religeous [sic] services in either house of the Legislative Assembly."

Oregon Revised Statutes, Section 337.150:

> *"337.150. Free textbooks; duty to provide, 'standard school' explained.*
>
> "(1) Each district school board shall, in the manner specified in ORS 328.520 and 328.525, provide textbooks, prescribed or authorized by law, for the free and equal use of all pupils residing in its district and enrolled in and actually attending standard elementary schools or grades seven or eight of standard secondary schools.
>
> "(2) For the purpose of ORS 328.520, 328.525 and 337.150 to 337.250 a school shall be standard when it meets the standards of the State Board of Education, except with respect to those standards applying to the ratio of pupils to the acre of school site, the square feet of classroom floor space per pupil and the ratio of pupils to teachers in classrooms, and when all teachers engaged in classroom instruction in said school hold a valid Oregon teaching certificate of the proper teaching level. The holding of such a teacher's certificate shall be evidenced by annual registration with the county school superintendent of the county in which the school is situated."

STATEMENT OF THE CASE

(1) The Historical Background

In 1922 the people of Oregon attempted through initiative legislation to compel all parents in the state to send their children to public schools. The law was invalidated by the unanimous decision of this Court in *Pierce* v. *Society of Sisters,* 268 U.S. 510.

In 1931 the legislature of Oregon enacted a statute providing free textbooks for the use of pupils attending the public elementary schools of Oregon. Oregon Laws 1931, chapter 61. The Attorney General of Oregon, appearing in the court below as *amicus curiae*, has described (Brief, p. 3) this 1931 law as

> "... a product of the depression of the 1930's. Under the compulsory school law, children were required to attend school, and yet, because of financial stress, their parents in many instances were unable to provide their children with the necessary texts to enable them to realize the benefits of the education furnished them by the state for their individual welfare as well as in the interest of the state and the general welfare of the community at large in creating an educated citizenry."

The validity of such legislation, limiting free textbooks to pupils attending public schools, is not in issue in this case. The present case arises out of a 1941 amendment to the free textbook law (Oregon Laws 1941, chapter 485), which, as amended,[2] decrees that each school district shall provide text books "for the free and equal use of all pupils residing in its district and enrolled in and actually attending standard elementary schools or grades seven and eight of standard secondary schools." ORS 337.150. A school is considered "standard" when it meets certain prescribed standards of the Oregon State Board of Education.

The 1941 revision of the statute accomplished two things: (1) it made the eligibility of children for free

[2] The inclusion of pupils attending grades seven and eight of standard secondary schools, in addition to those attending the standard elementary schools, was accomplished by an amendment to the statute in 1955. Oregon Laws 1955, chapter 486.

secular textbooks depend upon attendance at a "standard" elementary school, not upon attendance at a public school; (2) it created an incentive for all the schools in Oregon to meet certain educational standards established by the State Board of Education.

As noted by the Attorney General below (Brief, p. 5), the revised Oregon free textbook statute "represents a general program of public welfare legislation to help parents to provide the necessary textbooks for their children in pursuing their education which, under the laws of this state, is made compulsory." The 1941 expansion of the statute to include pupils attending private as well as public standard schools represented a conscientious effort by the Oregon legislators to include all children attending public or private schools which meet the requisite state standards.

But this 1941 extension demonstrated something more than a desire to aid the pupils attending private standard schools and the parents of such pupils. It also indicated, in the words of Judge Rossman's dissent below, a legislative wish "to improve the quality of the denominational schools" and "to bring to the avail of the pupils in denominational institutions textbooks which the legislature favored." The legislature, Judge Rossman said, was concerned with "the youth of Oregon and believed that textbooks chosen by the State Board of Textbook Commissioners would afford superior education to those selected by the denominational schools." See pp. 23a, 25a, *infra*.

Thus under the version of the free textbook law in effect, the sole requirement for the eligibility of children is attendance at a school meeting special academic standards set by the state. There is no preference for

those attending public standard schools and no discrimination against those attending private standard schools, whether church-related or otherwise.

(2) The Relevant Facts of This Case

Insofar as relevant to the resolution of the federal constitutional issues in this case, the following facts were established at the trial in the Circuit Court for Clackamas County:

a. St. John the Apostle School is an elementary parochial school in Oregon City, Oregon, situated within the boundaries of School District No. 62C. It is maintained and operated by the Roman Catholic Church and provides both secular education and religious instruction for its pupils. Tr. 233-234. According to the Supervisor of Elementary Education of the Oregon State Department of Education, who observed class room instruction at St. John's, the school's method of instruction in such secular subjects as arithmetic and spelling is substantially the same as in the public schools. Tr. 233-234.

b. A course in religion, covering the Catechism and Catholic dogma, occupies 20 to 30 minutes each day in the curriculum of each grade at St. John's. Tr. 107-108. Father Thielen, Superintendent of Catholic Schools in the Archdiocese of Portland with jurisdiction over St. John's School, testified with respect to the secular curriculum (Tr. 160):

> "We have a tradition in our Oregon schools that our curricula are in basic agreement. First of all, we teach the same subjects; we require that the same subjects be taught in parochial schools as are taught in public schools. We are very much influenced by State scope and sequence; in fact, I should say that in general we follow it."

He further stated (Tr. 207):

> "If is made very clear to teachers in our schools that while the motivation of our studies is religious, when we come to matters in our course content that are secular, shall we say, that that is not the time for teaching religious content. In other words, it is strongly emphasized in our schools that we do not confuse the teaching of secular subjects with the teaching of religion."

On the other hand, Professor Guy, Associate Professor of Education at Portland State College, testified generally—but without personal observation of and without specific reference to St. John's—that in parochial schools religion permeates the whole curriculum and is not confined to a single half hour per day. See Tr. 186-187.

c. St. John's at all material times has qualified as a standard elementary school as defined in ORS 337.150 and has been so certified. Tr. 16-18.

d. As a result of such certification, pupils attending St. John's have been accorded the same free use of state-adopted textbooks as is provided for pupils in the public schools in School District No. 62C. Tr. 13, 24-25, 38, 45.

e. These textbooks are all stamped "School District No. 62, Oregon City" and are delivered by the School District to the various public and private schools for distribution to the pupils. Such delivery is made in accordance with enrollment lists supplied by the schools. Teachers' editions of these books are also supplied to the schools. Tr. 16, 20, 38-39. The ownership of these books remains at all times in the School District.

f. All of the books delivered for the use of pupils attending St. John's are secular in nature, none of them being religious. They are all identical with those delivered for the use of public school pupils. Tr. 39-40. The total cost of books furnished to the St. John's pupils was $1,033.87 in 1957-58, $1,275.76 in 1958-59, and $1,750.57 in 1959-60 to the time of trial. Ex. 6. The full amount budgeted for 1959-60 was $2,500. Tr. 34

g. The Catechisms, social studies books and other books dealing with religious matters, which are also used in St. John's, are purchased by parents through the Diocesan office or supply houses. Tr. 103-104. These books are not supplied by School District No. 62C. Tr. 99.

h. The respondents Dickman, Salisbury and Smelser, who instituted the instant proceeding, are taxpayers residing within the boundaries of School District No. 62C. As taxpayers, they contribute to the cost of providing and distributing the textbooks to standard elementary schools in that district, including St. John's. Tr. 4.

i. Petitioner Carlson, who was allowed to intervene and participate in the proceedings, is a property owner and voter residing within the boundaries of School District No. 62C. Five of his children are enrolled in and attend St. John's School and they have received the free use of text books supplied through School District No. 62C. If they had not been furnished by the School District, Carlson would have had to buy these secular books. Tr. 210-211. Petitioner Carlson pays the annual $60 tuition at St. John's for each of his children, in addition to the $10 "book bill" for each child out of which is purchased religious books not supplied by the state

(3) History of This Litigation

This equity suit was instituted in the Circuit Court for Clackamas County, Oregon, by the three taxpayers identified herein as the respondents Dickman, Salisbury and Smelser. They sought to enjoin the respondent School District No. 62C, its board members and its clerk from supplying textbooks without charge for the use of pupils enrolled in St. John's School. They also sought a judicial declaration that the free textbook statute (ORS 337.150), under which distribution was made to the pupils of St. John's and other parochial schools, does not authorize the officials of the School District to provide textbooks without charge for use in church or parochial schools. Alternatively, they prayed that, if the statute be construed to authorize such distribution, it be declared in violation of the Constitution of the United States and the Constitution of the State of Oregon.

After being allowed to intervene, petitioner Carlson filed an answer to the complaint. The respondent School District and its officials also filed an answer.

On February 2, 1960, following a trial, the Circuit Court ruled (1) that there is no essential difference between the provisions of Article I, Section 5, of the Oregon Constitution and the First Amendment of the Federal Constitution respecting freedom of religion and the establishment of religion, and (2) that the ruling of this Court in *Everson* v. *Board of Education,* 330 U.S. 1, controlled this case as to the validity of the Oregon free textbook statute under both Constitutions. The statute was accordingly held constitutional, the complaint was denied and judgment was rendered in

favor of petitioner Carlson and the respondent School District and its officials.

The respondents Dickman, Salisbury and Smelser then appealed to the Supreme Court of the State of Oregon. The Attorney General of the State of Oregon appeared as *amicus curiae* in support of the position taken by petitioner Carlson and the respondent School District and its officials, urging that ORS 337.150 is constitutionally valid in all respects.

On appeal, a majority of the Supreme Court of the State of Oregon on November 15, 1961, reversed the judgment of the Circuit Court and directed that a decree be entered in accordance with the prayer of the complaint. It held that the statute in question was invalid solely by virtue of Article I, Section 5, of the Oregon Constitution, prohibiting the use of public moneys "for the benefit of any religious or theological institution." The furnishing of secular textbooks to parochial schools was said to constitute a substantial benefit to religious institutions within the meaning of that state constitutional provision. This conclusion was compelled, in the majority's view, "because such books are an integral part of the educational process" and "the teaching of the precepts of Catholicism is an inseparable part of the educational process in the St. John's school." While stating that the decision in *Everson* v. *Board of Education*, 330 U.S. 1, was not relevant to an adjudication of constitutionality under the Oregon Constitution, the majority expressed its total disagreement with the holding of this Court in that case.

The Supreme Court of the State of Oregon thus found it unnecessary to consider the contentions that

the state statute was also violative of the First or Fourteenth Amendments to the United States Constitution. But the majority did consider and did pass upon the petitioner Carlson's claim[3] that "the denial of the use of free textbooks to pupils solely because they attend parochial schools would constitute a violation of the equal protection clause of the Fourteenth Amendment." In rejecting that claim, the majority ruled (p. 20a, *infra*):

> "The argument is without merit. The classification which excludes such pupils from the state's bounty is not only reasonable, it is commanded by the constitution itself."

Judge Rossman dissented, stating that the *Everson* ruling was correct and that it was directly applicable to an interpretation of a constitutional principle that is the same in both the state and federal constitutions.

Petitioner Carlson filed a timely petition for rehearing, which was denied on March 13, 1962.[4] That petition, which is part of the certified record before this Court, raised *inter alia* the following federal constitutional claims arising out of the decision of the Oregon Supreme Court:

> (a) The majority's construction of Article I, Section 5, of the Oregon Constitution "would deny to parochial school pupils and their parents the

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[3] This claim was originally made in petitioner Carlson's pleadings in the trial court (Par. VII of Answer, Ab. 15) and in his brief on appeal (Br., pp. 18-19).

[4] The Attorney General as *amicus curiae*, as well as the School District and its directors and [redacted]rk, joined in the petition for rehearing.

religious liberties guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States." (pp. 39-45).

(b) The majority's construction of Article I, Section 5, of the Oregon Constitution "would operate to deny to parochial school pupils and their parents due process of law and the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States." (pp. 46-51).

To the extent that these federal constitutional questions were not anticipated by petitioner and expressly passed upon in the majority opinion below,[5] these questions were timely raised in the petition for rehearing. The majority decision, holding the statute invalid under the Oregon Constitution, could not have been reasonably anticipated from prior decisions of that court. And only after this decision was rendered, containing a new construction of the Oregon Constitution with reference to the state statute in question, did these federal constitutional issues emerge in their full context. Thus, raising those issues for the first time in the petition for rehearing was timely. *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-678; *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366-367.

[5] The majority opinion, of course, did expressly pass upon the claim that "the denial of the use of free textbooks to pupils solely because they attend parochial schools would constitute a violation of the equal protection clause of the Fourteenth Amendment."

REASONS FOR GRANTING THE WRIT

This case raises the nationally significant question whether the First and Fourteenth Amendments to the Constitution of the United States preclude a State from utilizing the exercise of a parental and religious right as a basis for classification for the conferral or withdrawal of public and secular educational benefits. More particularly,

(1) Can a State discriminate in the dissemination of public welfare benefits against those children who attend church-related schools, in contrast to those children who attend private or public nondenominational schools?

(2) Can a child be denied the free use of the same spelling book distributed freely to children attending other "standard" schools simply because his parents have sent him to a school which is both "standard" and religious in philosophy and practice?

(3) Can the child's parents be denied the educational and economic benefits of such free textbook distribution merely because they have, in the exercise of their constitutional right to choose a non-public school for their child, selected a school which is both "standard" and religiously-oriented?

These problems touch the heart of the universally felt need for more and better education. The State of Oregon has not sought here to confine its textbook bounty to those children attending public, as distinguished from non-public, schools. Rather it has attempted to distribute secular textbooks freely to all children attending schools meeting certain state standards, whether those schools be public or private in nature. The state legislature, moreover, has felt that the educational interests of the State in general and the secular quality of the private schools in par-

ticular would be advanced by extending the free textbook program to those attending all "standard" schools. The legislature accordingly established a broad classification in terms of "standard" schools, without reference to any other characteristic. To the extent that the religious nature of such "standard" schools is now held to preclude the free distribution of secular textbooks, this broad educational purpose formulated by the state legislature is frustrated.

More importantly than the frustration of such legitimate community educational efforts, serious constitutional problems are created by such a religious classification. And it is those problems to which this Court adverted in *Everson* v. *Board of Education*, 330 U.S. 1, 16, when it warned against prohibiting a State "from extending its general law benefits to all its citizens without regard to their religious belief." Religion cannot be put in a privileged position. Neither can it be placed in an underprivileged position.

The decision below, interpreting the Oregon Constitution, has directed a withdrawal after twenty years of the free use of secular textbooks from all those who receive religious training in their schools. Religion and religious training have been made the sole basis for determining, from among pupils attending "standard" elementary schools, who shall and who shall not receive and use the secular textbooks supplied by the respective School Districts. The constitutionality of such a classification is thus raised in concrete and unmistakable form.

This issue warrants and indeed necessitates the most careful and plenary consideration by this Court. Such review is made particularly appropriate by the fact that the classification established by the court below

appears to be in direct conflict with the First and Fourteenth Amendments and with the applicable decisions of this Court.

(1) The Equal Protection Issue

The court below flatly held that the Equal Protection Clause of the Fourteenth Amendment permits the denial or withdrawal of the use of free secular textbooks by pupils "solely because they attend parochial schools." The textbooks are to be withdrawn from their use since "the teaching of the precepts of Catholicism is an inseparable part of the educational process in the St. John's school." Such a classification, said the court, "is not only reasonable, it is commanded by the [State] constitution itself."

Here, then, is a classification in patently religious terminology, utilized to determine who shall receive the benefits of public welfare legislation. That type of classification is of the essence of the invidious discrimination outlawed by the Equal Protection Clause. And any judicial approval of such discrimination is directly contrary to this Court's decision in *Everson v. Board of Education*, 330 U.S. 1—a decision with which total disagreement was expressed by the court below.

In the *Everson* case, this Court declared that a State "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it*, from receiving the benefits of public welfare legislation." 330 U.S. at 16. Furthermore, said this Court, a State cannot be prohibited "from extending its general state law benefits to all its citizens without regard to their religious be-

lief." 330 U.S. at 16. These statements were accompanied by an express acknowledgment, 330 U.S. at 7, of the public welfare nature of a state statute designed to provide free secular textbooks to all school children, including parochial pupils.[6] Hence the *Everson* case teaches that the benefits of precisely the type of state bounty here enacted by the Oregon Legislature cannot be withheld from some children solely because they are Catholics or solely because they attend parochial schools.

True, the *Everson* case dealt primarily with the validity, under the Religious Establishment Clause of the First Amendment, of state legislation providing bus transportation for parochial school pupils. But the Court's remarks concerning the constitutional impropriety of withholding the benefits of public welfare legislation on the basis of religious beliefs bespeak of equal protection guarantees. Indeed, it has been said by one commentator that the commands of the Freedom of Religion and the Religious Establishment Clauses of the First Amendment "would be impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause, *i.e.*, they must be read to mean that religion may not be used as

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[6] The Court stated, 330 U.S. at 7, that "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." A citation was then made to *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, where a Louisiana statute substantially similar to the one enacted here by the Oregon Legislature was sustained under the Due Process Clause of the Fourteenth Amendment. The Louisiana statute provided for the supplying of secular textbooks free of cost to the school children of the state, including those attending private and church-related schools.

a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations."[7]

The purely religious nature of the classification said to be imposed by the Oregon Constitution is plainly evident. The privilege of receiving and using free secular textbooks is made to depend upon a religious factor—whether the child attends a parochial school where religious precepts are taught as an inseparable part of the curriculum. At the same time, the privilege remains available to pupils attending private nonreligious schools. Thus no question is presented as to the propriety of a classification in terms of those attending standard schools or in terms of those attending public schools. Religious considerations alone mark the dividing line.

Were free textbooks to be dispensed by the State of Oregon solely on the basis of the race or color of the pupils, the Equal Protection Clause would obviously preclude such a classification. See *Brown* v. *Board of Education*, 349 U.S. 294; *Cooper* v. *Aaron*, 358 U.S. 1. Just as a Negro cannot be denied the benefits of a state law designed to promote the general welfare of

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[7] Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 5 (1961). In analyzing the *Everson* opinion, this commentator concludes (p. 70): "In short, a classification in terms of public and non-public schools would be valid. A classification in terms of religion would be invalid."

See *State ex rel. Reynolds* v. *Nusbaum*, 30 Law Week 2623 (Wis. Sup. Ct., June 5, 1962), where a portion of a state statute, construed by the Wisconsin court to provide bus transportation for parochial students only, was held to confer a benefit on "those religious groups which operate parochial schools" and hence to constitute an invalid religious classification. The court relied heavily on the Kurland article to support the thesis that a religious classification is improper.

the citizenry, so too a Methodist, a Christian Scientist or a Catholic—or one who is taught particular religious precepts—cannot be denied such benefits. See *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100; *Torcaso* v. *Watkins*, 367 U.S. 488. As a norm for state action of a general public welfare nature, religion is as invidious as race or color.[8]

Such a conclusion does not imply that a State is under constitutional compulsion to supply free textbooks or other benefits to those who attend parochial or other private schools. A State may limit or condition the dispensation of its benefits on any reasonable basis it sees fit, such as a basis in terms of those attending public schools. But the basis cannot be in religious or racial terminology. Thus while a State is not required to provide free polio shots to children attending parochial schools, once it institutes a general immunization program for all children it cannot exclude therefrom Methodist, Jewish or Catholic children, or those children receiving religious training. It is that type of invidious religious discrimination that has been established by the court below.[9]

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[8] See also *Chance* v. *Mississippi State Textbook Board*, 190 Miss. 453, 200 So. 706, where a Mississippi statute providing for the distribution of free textbooks to the pupils of the elementary schools of Mississippi, including sectarian schools, was held valid. The court there stated that "The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all . . . there should be no religious disqualification in its private citizens for privileges available to a class to which they belong." Such a disqualification was said to "constitute a denial of equal privileges on sectarian grounds."

[9] Note Mr. Justice Jackson's comment in his dissent in the *Everson* case, 330 U.S. at 21: "Of course, this case is not one of a Baptist or a Jew or an Episcopalian or a pupil of a private

Hence the Equal Protection Clause, implemented by the *Everson* decision, renders nugatory the classification decreed by the Oregon court. That such classification was thought to be dictated by the provisions of the Oregon Constitution is no justification. A state constitution, no less than a state statute or some other form of state action, must yield to the principles of the Equal Protection Clause. *Neal* v. *Delaware,* 103 U.S. 370.

(2) The Due Process Issue

The Equal Protection Clause of the Fourteenth Amendment prohibits invidious discrimination. The reach of the Due Process Clause of that Amendment is broader, however, in that it prohibits arbitrary burdens upon the exercise of substantive rights. It thus outlaws the attachment of unconstitutional conditions to the eligibility standards for receipt of privileges and benefits. See *Speiser* v. *Randall,* 357 U.S. 513, 518-519.[10]

The important question here raised is whether the Due Process Clause permits a State to condition the bounty of free secular textbooks on the surrender of the parental and religious rights to send one's child to a denominational school. In other words, does the Due Process Clause permit a State to push its doctrine

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school complaining of discrimination." As he further said of the *Everson* case, "If it could, in fairness, have been said that the expenditure was a measure for the protection of the safety, health or morals of youngsters, . . . it would have been unconstitutional to refuse it [bus transportation] to any child merely because he was a Catholic." *McCollum* v. *Board of Education,* 333 U.S. 203, 233 (concurring opinion).

[10] See Willcox, *Invasions of the First Amendment Through Conditioned Public Spending,* 41 Cornell L.Q. 12 (1955); Note, *Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1599-1600 (1960); French, *Unconstitutional Conditions: An Analysis,* 50 Georgetown L.J. 234 (1961).

of separation of church and state to the point where secular benefits are denied simply because parents have exercised their constitutional right to send their children to schools in which religious precepts are taught?

This Court has unanimously held that parents have the right to discharge their duty under state compulsory education laws by sending their children to non-public rather than public schools, provided that reasonable state educational requirements are thereby met. *Pierce* v. *Society of Sisters*, 268 U.S. 510. This right was there considered to be a parental right, independent of religious ramifications. And see *Meyer* v. *Nebraska*, 262 U.S. 390, 399-402. In *Everson* v. *Board of Education*, 330 U.S. 1, this Court treated this right as one also partaking of a religious character under the First Amendment insofar as it relates to the choice of a non-public religious school meeting reasonable state standards. 330 U.S. at 16, 18 (majority opinion); at 27 (Jackson, J., dissenting); at 51 (Rutledge, J., dissenting). The right of the parent in this case is thus a double one: a parental right to choose any academically qualified school, public or non-public, and a religious right under the First Amendment to choose a religious school that is academically qualified.

In this instance, those parents who have exercised the freedom of parental and religious choice which the *Pierce* and *Everson* cases made secure have been financially penalized and excluded from benefits designed by the Oregon Legislature to be available to all parents of children attending "standard" schools. Because, and only because, they have exercised that freedom of choice they must suffer the economic and educational pains implicit in the withdrawal of such state aid. A penalty has been imposed on those who would seek to follow the demands of their parental and religious conscience. In short, the constitutional right of religi-

ous freedom, though inherent and free as to some, must here be purchased by parochial school parents. The significance of such a result under the Due Process Clause is at once obvious.

What legitimate state policy can be advanced to sustain such a serious condition on the exercise of these parental and religious rights? To say that the state concept of separation of church and state justifies such a discrimination is to beg the question, for the validity of that state-created concept in these circumstances is precisely the focal point of this constitutional inquiry. The Supreme Court of the State of Oregon has simply assumed that the policy of separating church and state is an end in and of itself, without regard to the impact on federal constitutional rights that may be created. The fact that the religious classification was thought to be "commanded by the [state] constitution itself" was said by the court to be an adequate answer to any federal equal protection claim—and presumably to any federal due process claim.

But federal constitutional rights are not to be disposed of so cavalierly, particularly when those rights relate to the exercise of a state power which this Court has repeatedly sustained. In *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370, this Court without dissent ruled that a textbook distribution statute similar to that enacted by the Oregon Legislature, whereby parochial school students were included among those receiving the free use of textbooks, is a permissible exertion—for purposes of the Due Process Clause of the Fourteenth Amendment—of state power for a broad public purpose, to wit, public education.[11] And in *Everson* v. *Board of Education*, 330 U.S. 1, it

[11] The majority opinion below disposed of the *Cochran* case by listing it as one in which "there simply has not been any real analysis of the problem." See p. 10a, *infra*, fn. 19.

was made plain that such legislation is of a public welfare nature which permits of no demarcations of a strictly religious nature. From the standpoint of the Federal Constitution, therefore, such legislation provides a general program to help parents secure a secular education for their children, regardless of their religion.

Thus *Cochran* and *Everson* hold that the First and Fourteenth Amendments construct no barrier to the *extension* by a State of secular benefits (such as textbooks and transportation) to children attending religious schools meeting state educational standards. The question left in this case is whether those Amendments create a barrier to the *exclusion* of such children from secular benefits solely because the schools they attend incorporate religious instruction. As yet, no great policy of the State of Oregon has been advanced which would authenticate, for purposes of the Due Process Clause, the discriminatory condition which has been placed on the exercise of the parental and religious rights of the parents to send their children to such denominational schools. The absence of such a decisive state interest leads to the outlawry of the condition. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624; *Torcaso* v. *Watkins*, 367 U.S. 488. The freedom of parental and religious choice enshrined in the First and Fourteenth Amendments prohibits this discriminatory burden.

(3) The Religious Freedom Issue

An inseparable part of the Due Process Clause of the Fourteenth Amendment is the freedom of religion guaranteed by the First Amendment. And, as already indicated, the parental right to select a religiously-oriented training for children partakes of that First Amendment religious freedom. See *Everson* v. *Board of Education*, 330 U.S. 1. Intentional discrimination

against that right, as accomplished by the classification adopted below, interferes with and burdens that right in a manner proscribed by the First Amendment. In the context of this case, a discriminatory price tag has been placed on the religious freedom available to this petitioner. Solely and only because he chose to exercise that right of selecting a denominational school, he must pay an economic price—to wit, the price of secular textbooks for his children.

But just as government in this country is without power to prescribe by law any particular form of religious activity, see *Engel* v. *Vitale*, 370 U.S. (June 25, 1962), so too it is without power to prescribe any discrimination or burden directed against a particular form of religious freedom. Maintenance of that principle demands that the decision below be reviewed.

CONCLUSION

To the end that religious classifications may not be made a permissible basis for withdrawing the benefits of general welfare legislation from otherwise qualified individuals, this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Oregon should be granted.

Respectfully submitted,

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July 11, 1962

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APPENDIX A

Opinion

No. 6960—November 15, 1961

IN THE SUPREME COURT OF THE STATE OF OREGON

IN BANC

DICKMAN ET AL., *Appellants*,

v.

SCHOOL DISTRICT NO. 62C ET AL., *Respondents*.

Appeal from Circuit Court, Clackamas County.

RALPH M. HOLMAN, Judge.

Argued and submitted September 6, 1961.

John D. Mosser, Portland, and *Leo Pfeffer*, New York City, argued the cause for appellants. With them on the briefs was Steve Anderson, Salem.

Paul R. Biggs, Oregon City, and *Roy F. Shields*, Portland, argued the cause and submitted a brief for defendants-respondents and intervenor-respondent. With them on the brief were F. Leo Smith and Randall B. Kester, Portland.

Robert Y. Thornton, Attorney General, and Catherine Zorn, Assistant Attorney General, Salem, submitted a brief amicus curiae in support of ORS 337.150.

Before MCALLISTER, Chief Justice, and ROSSMAN, WARNER, PERRY, SLOAN, O'CONNELL and GOODWIN, Justices.

REVERSED WITH DIRECTIONS.

O'CONNELL, J.

This is a suit in equity brought by plaintiff taxpayers against School District No. 62C, its board and clerk, to enjoin defendants from supplying textbooks without charge for the use of pupils enrolled in St. John's The Apostle School, a parochial school maintained and operated by the Catholic church. Plaintiffs also seek a judicial declaration

that the so-called free textbook statute (ORS 337.150), under which distribution was made to the St. John's school and other parochial schools, does not authorize defendants to supply textbooks free of charge to church or parochial schools, or if the statute is so construed that it be declared unconstitutional.

Ivan B. Carlson, a resident within School District No. 62C, whose children were enrolled in the St. John's school intervened.

The statute in question, ORS 337.150, reads as follows:

> "337.150 Free textbooks; duty to provide, 'standard school' explained. (1) Each district school board shall, in the manner specified in ORS 328.520 and 328.525, provide textbooks, prescribed or authorized by law, for the free and equal use of all pupils residing in its district and enrolled in and actually attending standard elementary schools or grades seven or eight of standard secondary schools.
>
> "(2) For the purpose of ORS 328.520, 328.525 and 337.150 to 337.250 a school shall be standard when it meets the standards of the State Board of Education, except with respect to those standards applying to the ratio of pupils to the acre of school site, the square feet of classroom floor space per pupil and the ratio of pupils to teachers in classrooms, and when all teachers engaged in classroom instruction in said school hold a valid Oregon teaching certificate of the proper teaching level. The holding of such a teacher's certificate shall be evidenced by annual registration with the county school superintendent of the county in which the school is situated."

Plaintiffs attack the constitutionality of the statute on four grounds; (1) it authorizes state aid to religion at public expense in violation of the First Amendment to the United States Constitution as made applicable to the

states by the Fourteenth;[1] (2) the furnishing of such textbooks constitutes a benefit to religious institutions contrary to the provisions of Article I, § 5 of the Oregon Constitution;[2] (3) it, in effect, imposes a tax for a nonpublic purpose and thus deprives plaintiffs of property without due process of law, and (4) it authorizes the expenditure of money not exclusively for the support and maintenance of the common schools and is, therefore, in violation of Artilce VIII, § 2 of the Oregon Constitution.[3]

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[1] The First Amendment provides as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[2] Article I, § 5 provides: "No money shall be drawn from the Treasury for the benefit of any religeous (sic), or theological institution, nor shall any money be appropriated for the payment of any religeous (sic) services in either house of the Legislative Assembly."

[3] Article VIII, § 2 provides: "The proceeds of all the lands which have been, or hereafter may be granted to this state, for educational purposes (excepting the lands heretofore granted to, and [aid] in the establishment of a university) all the moneys, and clear proceeds of all property which may accrue to the State by escheat, or forfeiture, all moneys which may be paid as exemption from Military duty, the proceeds of all gifts, devises and bequests, made by any person to the State for common school purposes, the proceeds of all property granted to the State, when the purposes of such grant shall not be stated, all proceeds of the five hundred thousand acres of land to which this State is entitled by the provisions of an act of Congress, entitled '*An act to appropriate the proceeds of the Sales of the public lands, and to grant* [illegible] *premption (sic) rights, approved the fourth of September 1841,*" and also the five per centum of the Net proceeds of the Sales of the public lands, to which this State shall become entitled on her admission into the union (if Congress shall consent to such appropriation of the two grants last mentioned) shall be set apart as a seperate (sic), and irreducible fund to be called the common school fund, the interest of which togather (sic) with all other revenues derived from the school lands mentioned in this section shall be exclusively applied to the support, and maintenance of common schools in each School district, and the purchase of suitable libraries, and apparatus therefor."

Plaintiffs rely principally upon the first two grounds in attacking the constitutionality of the statute. The trial court held ORS 337.150 constitutional. Plaintiffs appeal.

For a period of several years the defendant district has furnished free textbooks for the use of the pupils of St. John's school. In a period of three school years these books have cost the district approximately $4,000. The books were purchased by the district from money in its General Fund, a part of which was derived from taxes levied upon real property in the district, including real property owned by plaintiffs. Books furnished by the district under ORS 337.150, whether to public or to parochial schools, are delivered to the persons in charge of the schools—not to the pupils individually. The district also furnishes teacher's editions of each text. The district retains title to the books, a matter of little practical significanse however, because the books are not ordinarily retrieved by the district. Textbooks furnished for the use of parochial school students do not differ from those delivered to public schools. A school it not entitled to receive free textbooks unless it complies with standards established by the Oregon statutes as implemented by administrative regulation. The St. John's school met these standards.

The evidence establishes, and the trial judge found, that the purpose of the Catholic church in operating the St. John's school and other similar schools under its supervision is to permeate the entire educational process with the precepts of the Catholic religion. The study guides used by the teachers in St. John's school indicate that, to some extent at least, the use of the textbooks furnished by the district is inextricably connected with the teaching of religious concepts. These study guides were prepared by the superintendent of schools of the Archdiocese of Portland. There is no doubt that the teaching of the subject matter in this manner in a public school would be contrary to law.[4]

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[4] Annotation 45 ALR 2d 742 (1956); Annotation 141 ALR 1144 (1942); Annotation 5 ALR 866 (1920). See Note, 41 Va L Rev 789, 795-98 (1955); Note, 47 Colum L Rev 1346 (1947).

Defendants first challenge plaintiffs' standing to raise any constitutional issue other than the violation of the due process clause of the Fourteenth Amendment. Plaintiffs have not shown, it is argued, a deprivation of any freedom guaranteed by the First Amendment since they do not sue as school children, parents of school children, or as persons whose own religious liberty is threatened. As will appear below, we have chosen to decide the issues presented in this case solely upon the basis of the Oregon Constitution. It is not necessary, therefore, to decide whether under federal law defendants' contention with respect to standing is sound.[5]

The question of plaintiffs' standing to assert Article I, § 5 in this cause is not directly raised by defendants. The Oregon cases on standing do not provide us with a clear guide. It has been held that for some purposes at lease a person contesting a public expenditure must plead and prove that the threatened action probably will result in a general increase in taxation.[6] Plaintiffs did not expressly alleged in their complaint that the expenditures made by the defendant district increase the tax burden upon them or upon taxpayers generally, although the claim

[5] Everson v. Board of Education, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946) recognized the standing of a taxpayer to assert the First Amendment in contesting state expenditures for parochial schools. See, Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv L Rev 1265 (1961).

[6] Morris v. City of Salem et al, 179 Or 666, 174 P 2d 192 (1946). Cf., State ex rel Durkheimer v. Grace, 20 Or 154, 25 P 382 (1890). State ex rel Shaw v. Ware, 13 Or 380, 10 P 885 (1886). See also Portland Gen. Elec. Co. v. Judd, 184 Or 386, 401-404, 198 P 2d 665, 612-613, 6 ALR 2d 547 (1948), which distinguishes cases holding that a taxpayer has no standing to attack election procedures from cases holding that a taxpayer may restrain an illegal expenditure of public funds. There is some confusion as to whether a representative suit instituted for the benefit of the public at large must be brought by or in the name of the State of Oregon or the appropriate state agency. Compare Terwilliger Land Co. v. City of Portland, 62 Or 101, 123 P 57 (1912) with Gosso v. Riddell, 123 Or 57, 261 P 77 (1927), and Vinton v. Hoskins, 174 Or 106, 147 P 2d 892 (1944).

that such an increase occurrs might be inferred from the allegations that plaintiffs are taxpayers, that public moneys were appropriated and expended in the purchase of textbooks for distribution to St. John's school and that this "constitutes the imposition of a tax."[7] The precise question of whether a taxpayer has standing to contest the expenditure of public moneys for the support of religious education has been passed upon by other courts. In some of the adjudicated cases the taxpayer has been accorded standing even in the absence of allegation or proof that he will be damaged in a pecuniary way.[8] And there is support for the proposition that the problem of standing will be overlooked when an issue of unusual importance is presented.[9]

In the instant case the issue of plaintiffs' standing was not raised by defendants' pleadings. If standing were a jurisdictional matter then, of course, defendants could raise the question at any stage in the proceedings. But we do not so regard it and we hold, therefore, that defendants' failure to raise the issue by a proper pleading constitutes a waiver of that issue.[10]

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[7] Accord Berghorn v. Reorganized School Dist. No. 8, 364 Mo 121, 260 SW 2d 573 (1953).

[8] See for example, Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss 453, 200 So 706 (1941); Mitchell v. Consolidated School Dist., 17 Wash 2d 61, 135 P 2d 79, 146 ALR 612 (1943). In some cases the question of standing is not discussed. Rawlings v. Butler, 290 SW 2d 801 (Ky 1956); Smith v. Donahue, 202 App Div 656, 195 NYS 715 (1922); Gerhardt v. Heid, 66 N D 444, 267 NW 127 (1936); Swart v. South Burlington Town School Dist., —— Vt ——, 167 A 2d 514 (1961) (United States Supreme Court appeal pending).

[9] Kuhn v. Curran, 294 NY 207, 61 NE 2d 513, rehearing denied 294 NY 963, 63 NE 2d 188 (1945), followed in Elkind v. City of New Rochelle, 163 NYS 2d 870 (1957); Peters v. New York City Housing Authority, 128 NYS 2d 224 (1953), *modified*, 238 App Div 801, 128 NYS 2d 712 (1954); 3 Davis, Administrative Law § 22.09, p. 246 (1958).

[10] See Portland Gen. Elec. Co. v. Judd, 184 Or 386, 394, 396, 198 P 2d 605, 609, 610 (1948). See also, 3 Davis, Administrative Law § 22.01, pp. 209-210 (1958).

The First Amendment, as interpreted in *Everson v. Board of Education*, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946) and Article 1, § 5 of the Oregon Constitution prohibit the use of state funds for the benefit of religious institutions. The principal issue presented to us is whether the expenditure of public funds by the defendant school district for the purpose of furnishing textbooks free of charge to pupils of a parochial school is within these constitutional prohibitions.

We have concluded that the expenditure authorized by ORS 337.150 is within the proscription of Article I, § 5 of the Oregon Constitution. It is unnecessary, therefore, to consider plaintiffs' contention that the statute violates also the First or Fourteenth Amendments to the United States Constitution. Nor is it necessary to consider whether Article VIII, § 2 of the Oregon Constitution has been violated.

Article I, § 5 prohibiting the use of public moneys "for the benefit of any religious or theological institution," was designed to keep separate the functions of state and church and to prevent the influence of one upon the other. In this respect our constitution follows the general pattern of other state constitutions and may be regarded as expressing, in more specific terms, the policy of the First Amendment as it has been explained in the Everson case.[1]

The historical setting in which constitutional provisions such as Article I, § 5 were written and the factors which prompted their adoption have been thoroughly explained elsewhere; it is not necessary, therefore, to restate those

[1] For various types of constitutional provisions see 50 Yale L J 917, 920 (1941); Note, 60 Harv L Rev 793, 794 (1947).

observations here.[12] We need only say that we regard the separation of church and state no less important today than it was at the time Article I, § 5 and its counterpart in other constitutions were adopted.[13]

The general policy is clear. Our problem is to determine whether that policy is violated by the distribution of free textbooks to parochial schools under ORS 337.150. A simple solution would be to declare that Article I, § 5 prohibits the legislature from conferring *any* benefit upon religious institutions including church supported schools, no matter how indirect it might be. But the principle of separation of church and state has not been applied in such strict form. A certain amount of interplay of influ-

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[12] See McCollum v. Board of Education, 333 US 203, 213, 68 S Ct 461, 466, 92 L Ed 649, 659 (1947) (concurring opinion); Everson v. Board of Education, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946); Judd v. Board of Education of Union Dist., No. 2, 278 NY 200, 15 NE2d 576, 118 ALR 789 (1938); Carey, A History of the Oregon Constitution (1926); Hudspeth, Separation of Church and State in America, 33 Tex L Rev 1035 (1955); Konvitz, Separation of Church and State: The First Freedom, 14 Law & Contemp Prob 44 (1949); Note 60, Harv L Rev 793 (1947); Note, 50 Yale L J 917 (1941).

[13] Some of the reasons for this separation, as expressed by the courts and legal writers, are: Everson v. Board of Education, supra, 330 US at 11, 67 S Ct at 509, 91 L Ed at 721, "The people * * * reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions * * *"; Judd v. Board of Education, supra, 278 NY at 209, 15 NE2d at 581, "A policy of that kind [state aid to religion] * * * would open the door for a dangerous and vicious controvery among different religious denominations as to who should get the largest share of school funds"; Fahy, Religion, Education and the Supreme Court, 14 Law & Contemp Prob 73, 90 (1949), "This policy * * * is a recognition of an ancient realization of the distinct functions of a temporal government and of a church concerned with the supernatural:", Note, 50 Yale L J 917, 926, n. 58 (1941), "Acceptance of public funds by Catholic schools would result in state control over the manner in which the funds were used, and the schools would lose most of their present independence."

ences exercised by state and church has been permitted. It is not difficult to cite examples. Thus, we find that provision is made for chaplains in both houses of Congress and in the Armed Forces; for chapel services at West Point and Annapolis; sessions of the legislature are opened with prayer; the Bible is used to administer oaths, and many other religious practices and connotations are found in the functioning of government, both state and federal.[14]

Moreover, the wall of separation has not been regarded as a barrier preventing all financial aid to religious institutions. In some instances the aid is direct and substantial.[15] In others the financial aid flows indirectly and incidentally as a result of a tax exemption or other favored treatment,[16] or through an expenditure for a governmental purpose clearly within constitutional limits.[17]

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[14] Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis L Rev 427, 474 (1950).

[15] Bradfield v. Roberts, 175 US 291 (1899) (appropriation for building a ward on property owned by a Catholic hospital); St. Hedwig's Industrial School for Girls v. Cook County, 289 Ill 432, 124 NE 629 (1919) (state payment to a church owned and operated industrial school); Dunn v. Chicago Industrial School for Girls, 280 Ill 613, 117 NE 735 (1917) (state payment to a church owned and operated industrial school); Millard v. Board of Education, 121 Ill 297, 10 NE 669 (1887) (parochial school supported as a public school); State ex rel Johnson v. Boyd, 217 Ind 348, 28 NE2d 256 (1940) (parochial schools operated as a part of the public school system); Rawlings v. Butler, 290 SW2d 801 (Ky 1956) (parochial school supported as a public school).

[16] 26 USC § 501(c)(2), (3), 501(d) (1958) (exemption from income tax of religious organizations and corporations); 26 USC § 107 (1958) (exclusion from gross income of a rental allowance or home given a minister); 26 USC § 170 (1958) (individual taxpayer's deduction for contribution to religious organizations); St. Patrick's Church Society v. Heermans, 68 Misc 487, 124 NYS 705 (1910) free water furnished to a parochial school under a lease to a private company of city owned waterworks); Gubler v. Utah State Teachers' Retirement Bd., 113 Utah 188, 192 P2d 580, 2 ALR2d 1022 (1948) (teachers' retirement act allowed credit for time spent teaching in parochial schools). See Paulsen, Preferment of Religious Institutions in Tax and Labor Legislation, 14 Law & Contemp Prob 144 (1949); Note, 3 Rutgers L Rev 115 (1949).

[17] See, Bowker v. Baker, 73 Cal App2d 653, 666, 167 P2d 256, 262 (1946).

For the most part these cases afford us little assistance in the interpretation of our own constitution. This is so because in some of them the controlling constitutional provision differs from ours or is seen against a different historical background. In many instances it is obvious that constitutional principles have been sacrificed to serve urgent needs of the community and state;[18] and in others there simply has not been any real analysis of the problem.[19] Some of these cases are strongly relied upon by defendants. We do not propose to appraise each of the numerous cases which have attempted to draw the line of distinction between expenditures which are within and expenditures which are outside constitutional limits.[20] The reasoning employed in these cases will be examined as we consider defendants' argument.

Defendants' principal argument in support of the statute is that the expenditure of public funds for the purpose of furnishing books to pupils of parochial and public schools benefits the pupils who receive these books and not the schools themselves. The leading case for this proposi-

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[18] St. Hedwig's Industrial School for Girls v. Cook County, 289 Ill 432, 124 NE 629 (1919); Dunn v. Chicago Industrial School for Girls, 280 Ill 613, 117 NE 735 (1917); Rawlings v. Butler, 290 SW 2d 801 (Ky 1956).

[19] Cochran v. Board of Education, 281 US 370, 50 S Ct 335, 74 L Ed 913 (1930); Bradfield v. Roberts, 175 US 291 (1899); Millard v. Board of Education, 121 Ill 297, 10 NE 669 (1887); Borden v. Louisiana State Board of Education, 128 La 1005, 123 So 655, 67 ALR 1183 (1929); St. Patrick's Church Society v. Heermans, 68 Misc 487, 124 NYS 705 (1910); Gubler v. Utah State Teacher's Retirement Bd., 113 Utah 188, 192 P2d 580, 2 ALR2d 1022 (1948).

[20] For a treatment of some of these cases see Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill L Rev 333 (1950); Fellman, Separation of Church and State in the United States; A Summary View, 1950 Wis L Rev 4 7 (1950); Sullivan, Religious Education in the Schools. 14 Law Contemp Prob 92 (1949); Note, 60 Harv. L Rev 793 (1947); Note, 3 Rutgers L Rev 115 (1949); Note, 50 Yale L J 917 (1941).

tion is *Borden v. Louisiana State Board of Education*, 168 La 1005, 123 So 655, 67 ALR 1183 (1929). In that case a statute similar to ORS 337.150 was attacked on constitutional grounds essentially the same as those asserted in the case at bar. The Louisiana court, with three Justices dissenting, sustained the statute on the ground, among others, that the expenditure was for the benefit of pupils and not in aid of schools.[21]

This so-called "child benefit theory" has been applied in other cases in which the expenditure of public funds is made for the purpose of meeting the educational needs of pupils, including those attending parochial schools.[22] The difficulty with this theory is however, that unless it is qualified in some way it can be used to justify the expenditure of public funds for every educational purpose, because all educational aids are of benefit to the pupil. This criticism is made in *Gurney v. Ferguson*, 190 Okla 254, 255, 122 P2d 1002, 1003-1004 (1942). In passing upon expenditures for the transportation of children attending parochial schools the court said:

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[21] The Borden case was followed in Cochran v. Louisiana State Board of Education, 168 La 1030, 123 So 664 (1929). The latter case was appealed to the United States Supreme Court (281 US 370). The only question on that appeal was whether the act authorized the taking of private property for a private purpose in violation of the Fourteenth Amendment. The applicability of the First Amendment was not considered.

[22] Bowker v. Baker, 73 Cal App2d 653, 167 P2d 256 (1946) (transportation furnished to students of parochial schools); Borden v. Louisiana State Board of Education, 168 La 1005, 123 So 655, 67 ALR 1183 (1929) (textbooks furnished parochial school students); Adams v. County Commissioners of St. Mary's County, 180 Md 550, 26 A2d 377 (1942) (reimbursement to parochial school for the expense of transporting its students); Board of Education v. Wheat, 174 Md 314, 199 A 628 (1938) (transportation furnished to students of parochial schools); Chance v. Mississippi State Textbook Rating & Purchasing Bd., 190 Miss 453, 200 So 706 (1941) (textbooks furnished parochial school students); Everson v. Board of Education of Ewing Twp., 133 NJL 350, 44 A2d 333 (1945) (transportation furnished to students of parochial schools).

> "* * * It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one."

And, as observed by the same court, if the expenditure is not in aid of schools the use of school funds would be unauthorized and illegal.[23]

The leading case rejecting the child benefit theory is *Judd v. Board of Education*, 278 NY 200, 15 NE2d 576, 118 ALR 789 (1938). In that case the validity of a statute authorizing the expenditure of public funds for the transportation of pupils to and from parochial and private schools was in question. The court said:

> "* * * Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations' (State ex rel. Traub v. Brown, 36 Del. 181, 187, writ of error dis-

[23] Mitchell v. Consolidated School Dist., 17 Wash2d 61, 67, 135 P2d 79, 81-82, 146 ALR 612 (1943). "We cannot, however, accept the validity of the argument that transportation of pupils to and from school is not beneficial to, and in aid of the school. Even legislation providing for transportation of pupils to and from public schools is constitutionally defensible only as the exercise of a governmental function furthering the maintenance and development of the common school system."

See also Note, 60 Harv L Rev 793, 797, n. 51 (1947).

missed, Feb. 15, 1938). Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid." Id. at 212, 15 NE2d at 582.

The furnishing of textbooks even more clearly constitutes an educational aid. In the Everson case the expenditure for the transportation of parochial school pupils was upheld on the theory that the state could provide for the protection of all school children from traffic hazards irrespective of the religious or public character of schools which they attended. Assuming that the court's reasoning in Everson is sound, it is not applicable to the case at bar. The expenditure of public funds for textbooks supplied to pupils of parochial schools is clearly identified with the educational process, and does not warrant the assumption made in the Everson case that the expenditure is for the general welfare thus justifying the use of the state's police power.

The most recent appraisal of the child benefit theory which has been brought to our attention is *Matthews v. Quinton*,— Alaska.—, 362 P2d 932 (1961). In that case a statute authorizing the transportation of children attending non-public schools was held to be in violation of the Alaska constitutional provision prohibiting the appropriation of public money for the support or benefit of any sectarian, denominational or private school. After a careful examination of the cases in which the child benefit theory had been considered, the court rejected the theory, holding that the furnishing of transportation to pupils of non-public schools constituted a direct benefit to those schools. Mr. Justice Rutledge's dissent in the Everson case was relied upon to support this conclusion. There it was said:

"Finally, transportation, where it is needed, is as essential to education as any other element. Its cost is as much a part of the total expense, except at times

in amount, as the cost of textbooks, of school lunches, of athletic equipment, of writing and other materials; indeed of all other items composing the total burden. Now as always the core of the educational process is the teacher-pupil relationship. Without this the richest equipment and facilities would go for naught. See Judd v. Board of Education, 278 NY 200, 212, 15 NE2d 576, 582. But the proverbial Mark Hopkins conception no longer suffices for the country's requirements. Without buildings, without equipment, without library, textbooks and other materials, and without transportation to bring teacher and pupil together in such an effective teaching environment, there can be not even the skeleton of what our times require. Hardly can it be maintained that transportation is the least essential of these items, or that it does not in fact aid, encourage, sustain and support, just as they do, the very process which is its purpose to accomplish. No less essential is it, or the payment of its cost, than the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without." 330 US 1, 47-48.[24]

We concur in the view that expenditures which aid a child as a pupil of a religious school cannot in that respect be regarded as serving the public welfare as that term is used in defining the state's police power. The reason is stated by Mr. Justice Rutledge in his dissent in *Everson v. Board of Education*, 330 US 1, 53, 67 S Ct 504, 529, 91 L Ed 711, 742, 168 ALR 1392 (1946): the First Amendment "has removed this form of promoting

[24] In some cases it is admitted that the parochial schools are aided by a particular expenditure but that the aid is so unsubstantial that it does not come within the constitutional prohibition against aid to sectarian institutions. Nichols v. Henry, 301 Ky 434, 444, 191 SW2d 930, 935 (1945) held that the aid was so indirect that it was not "sufficient to defeat the declared purpose and the practical and wholesome effect of the law." And it is pointed out that "many expenditures of public money give indirect and incidental benefit to denominational schools" as for example, sewers, sidewalks, streets, police and fire protection. Bowker v. Baker, 73 Cal App2d 653, 666, 167 P2d 256, 262 (1946).

the public welfare from legislative and judicial competence to make a public function. It is exclusively a private affair".[25] The dissenting opinion in *Borden v. Louisiana State Board of Education*, 168 La 1005, 1030, 123 So 655, 664, 67 ALR 1183 (1929) expresses the same idea: "Nor is there any room here for the application of the state's police power. That power is not absolute and cannot be invoked to sustain legislative acts which in their operation defeat the objects and purposes of the organic law."[26] We are of the opinion that this analysis is correct.

It is argued that the aid to school children is for a public purpose because the compulsory school law compels all children to attend school and that the state may, therefore, make expenditures to further compliance. But this begs the basic question—the state may not compel compliance through the device of furnishing aid to religious schools if that aid is in violation of the constitution.[27] Moreover, the state does not compel pupils to attend *parochial* schools; "their attendance upon the parochial school or private school is a matter of choice and the cost thereof not a matter of public concern." *Judd v. Board of Education*, supra, 278 NY at 211, 15 NE2d at 582.

The theory has been advanced in some cases that since the parochial schools are performing a task which the state itself must perform through the use of the public schools, the expenditures made are not "aid" but "remuneration" for services rendered and, therefore, not pro-

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[25] "By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment's bar." Rutledge, dissenting in Everson v. Board of Education, 330 US at p. 52.

[26] Accord, Mitchell v. Consolidated School Dist., 17 Wash2d 61, 135 P2d 79, 146 ALR 612 (1943).

[27] Judd v. Board of Education, 278 NY 200, 215, 15 NE2d 576, 584, 118 ALR 789 (1938).

hibited by the constitutional principle of separation of church and state.[28] The distinction is specious and its application could be urged in the justification of the expenditure of public moneys for all educational needs of parochial schools.

In the instant case the evidence establishes that the defendant school district expended approximately $4,000 for textbooks used in the St. John's school. This constitutes a substantial benefit. The benefit is of such a character as to bring it within the proscription of Article I, § 5.

It seems obvious that a slong as church and state continue to exist side by side there cannot be a complete isolation of each, with neither exerting influence upon the other. It is to be expected that in the operation of the state residual benefits will accrue to the various religious groups, not because they are religious organizations but because they are, like other organizations, a part of the community which the state will, and must serve indiscriminately. As Mr. Justice Black observed in the Everson case, the First Amendment (and its counterpart in state constitutions) "requires the state to be neutral in its relation with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them" (330 US 1, 18).

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[28] St. Hedwig's Industrial School for Girls v. Cook County, 289 Ill 432, 124 NE 629 (1919); Trost v. Ketteler Manual Training School for Boys, 282 Ill 504, 118 NE 743 (1918); Dunn v. Addison Manual Training School for Boys, 281 Ill 352, 117 NE 993 (1917); Dunn v. Chicago Industrial School for Girls, 280 Ill 613, 117 NE 735 (1917); Murrow Indian Orphans Home v. Childers, 197 Okla 249, 171 P2d 600 (1946); State ex rel Atwood v. Johnson, 170 Wis 251, 176 NW 224 (1920). *Contra*, Cook County v. Chicago Industrial School for Girls, 125 Ill 540, 18 NE 183 (1888); Synod of Dakota v. State, 2 S D 366, 50 NW 632 (1891). But cf., State ex rel Orr v. City of New Orleans, 50 La Ann 880, 24 So 666 (1898). See Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill L Rev 333 (1950).

Neither the federal nor the state constitutions prohibit the state from conferring benefits upon religious institutions where that benefit does not accrue to the institution as a religious organization. The proscription is against aid to religious *functions:* The benefits of police and fire protection, sewage, disposal, and other community financed services accrue to churches, not as religious organizations but as owners of property in the community.[29] And, the same principle applies when public expenditures benefit individuals who are engaged in carrying out a religious function. A Government pension paid to a clergyman for his services in the Armed Forces may benefit religion but it is not constitutionally prohibited; in such case he receives the bounty not as a cleric but as any other citizen. On the other hand, the state obviously could not pay the clergyman's salary. The point is clearly seen by Cushman, Public Support of Religious Education in American Constitutional Law, 45 Ill L Rev 333, 348 (1950):

> "The difference between providing police protection and providing teachers does not lie in the identity of the beneficiary but in the way in which the aid is extended. Aid is not normally extended to individuals or institutions by name, but rather to groups or classes of individuals or institutions. Any individual or institution falling under the restrictions of the law, or falling heir to its benefits, does so only as a member of such a group. An individual may be a pupil, a pedestrian, a property owner and a parent. A church is at once a corporation, a piece of property, a building, a meeting place, a religious institution and a non-profit institution. Furthermore, a church may receive police protection when classed as property,

[29] Bowker v. Baker, 73 Cal App2d 653, 666, 167 P2d 256 (1946) erroneously concludes that because "many expenditures of public money give indirect and incidental benefit to denominational schools" as for example, expenditures for sewers, sidewalks, streets and roads, expenditures for the transportation of pupils to parochial schools is also authorized. Since the expenditures in the two types of cases relate to two different functions of the parochial schools the court's conclusion is not logically sound.

> tax exemption when classed as a non-profit institution, sewage connections when classed as a building, and yet be denied financial aid when classed as a religious institution, since such a class may not validly be given public aid. Since the aid goes to groups rather than the individual components of any one group, the eligibility of an institution to receive public aid would seem to depend on which group it is classed in, rather than on its individual characteristics."[30]

The author then correctly concludes that where the aid is to pupils and schools the benefit is identified with the function of education and if the educational institution is religious, the benefit accrues to religious institutions in their function as religions institutions. And so it is in the case at bar. Granting that pupils and not schools are intended to be the beneficiaries of the state's bounty, the aid is extended to the pupil only as a member of the school which he attends. Whoever else may share in its benefits such aid is an asset to the schools themselves. *State ex rel Traub v. Brown*, 36 Del 181, 172 A 835 (1934). The St. John's school shares in this benefit in a direct and vital way.[31] We attach no significance to the fact that the books are loaned to the pupil or school rather than given outright; in either event a substantial benefit is conferred upon the recipient.[32]

We recognize that whether an expenidture is an aid to a religious institution in its religious function or in some other capacity is a question of degree. But it seems clear that the line must be drawn to include within the constitu-

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[30] See also, Mr. Justice Jackson's dissent in the Everson case, *supra* at 25, 67 S Ct at 516, 91 L Ed at 728.

[31] We do not regard as significant the fact that our constitution does not contain the phrase "directly or indirectly" as some constitutions do. But cf., Judd v. Board of Education, *supra*. See, Note, 60 Harv L Rev 793, 795 (1947).

[32] See Borden v. Louisiana State Board of Education, 168 La 1005, 123 So 655, 67 ALR 1183 (1929) (dissenting opinion)."

tional proscription the furnishing of textbooks to pupils of parochial schools. This conclusion is compelled because such books are an integral part of the educational process. As we have already pointed out, the teaching of the precepts of Catholicism is an inseparable part of the educational process in the St. John's school. Considering the purpose of Article I, § 5, we are unable to see any substantial distinction between the furnishing of textbooks and the furnishing of blackboards, desks, laboratory instruments, or other equipment clearly necessary to the operation of the school. In comparing these various essential tools we agree with the dissenting opinion in *Everson v. Board of Education of Ewing Twp.*, 133 NJL 350, 359, 44 A2d 33 (1945) that there is no way of "satisfactorily distinguishing one item of expense from another in the long process of child education."

It is argued that the strict notions of separation in vogue at the time of the adoption of our constitutional provisions no longer exist and that these provisions should be interpreted to reflect this change in attitude.[33] Conceding that such change has occurred, there are still important considerations warranting the resolve that the wall of separation between church and state "must be kept high and impregnable." *Everson v. Board of Education*, supra, at p. 18. Among other things, the extension of aid to religious educational institutions could, as observed in *Judd v. Board of Education*, supra at 209, 15 NE2d at 581, "open the door for a dangerous and vicious controversy among the different religious denominations as to who should get

[33] Sullivan, Religious Education in the Schools, 14 Law & Contemp Prob 92, 107 (1949); Note, 36 Geo L J 631 (1948). But cf., Murray, Law on Prepossessions, 14 Law & Contemp Prob 23, 24-26 (1949).

the largest share of school funds."[34] More important, perhaps, is the danger that the acceptance of state aid might result in state control over religious instruction. Some religious leaders, including leaders in the Catholic church, have opposed the acceptance of public funds on this ground.[35] These considerations convince us that the wall of separation in this state must also be kept "high and impregnable" to meet the demands of Article I, § 5.

We are not unmindful of the fact that parents who send their children to Catholic schools must bear the double burden of supporting not only their own parochial schools but the public schools as well. But the added burden is self-imposed; instruction in the public schools is available to all. Catholic schools operate only because Catholic parents feel that the precepts of their faith should be integrated into the teaching of secular subjects. Those who do not share in this faith need not share in the cost of nurturing it. Article I, § 5 so ordains.

Defendants argue that the denial of the use of free textbooks to pupils solely because they attend parochial schools would constitute a violation of the equal protection clause of the Fourteenth Amendment. The argument is without merit. The classification which excludes such pupils from the state's bounty is not only reasonable, it is commanded by the constitution itself.

The principle announced in *Pierce v. Society of Sisters*, 268 US 510, 45 S Ct 571, 69 L Ed 1070 (1925), relied upon by defendants, is not germaine to the problem before us.

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[34] Everson v. Board of Eduction, 330 US 1, 59 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946) (dissenting opinion); Williams v. Board of Trustees, 173 Ky 708, 191 SW 507, 514 (1917); Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis L Rev 427, 444-45; Note, 47 Colum L Rev 1346, 1355 (1947); Note, 60 Harv L Rev 793, 794 (1947).

[35] 13 Cath Encyc 560 (1912); Note, 50 Yale L J 917, 926, n. 58 (1941).

That case simply recognizes the constitutional right of a parent to pursue freely his religious beliefs by sending his children to parochial schools. The court did not hold; nor was anything said in the case from which it could be implied, that the state must pay for the child's education if the parent elects to use the parochial schools.

The trial judge was of the opinion that the expenditures in question constituted a violation of the constitutional principle of separation of church and state, but he concluded that he was bound by *Everson v. Board of Education*, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1946). A decision of the Supreme Court of the United States holding that certain legislation is not in violation of the federal constitution is not an adjudication of the constitutionality of the legislation under a state constitution. In such a case it is not only within the power of the state courts, it is their duty to decide whether the state constitution has been violated. Our views on the policy or interpretation of a particular constitutional provision do not always coincide with those of the Supreme Court of the United States. As we have indicated, *Everson v. Board of Education*, supra, is distinguishable from the case at bar. Even if it were not, our conclusion would be the same.

The judgment is reversed. The trial court is directed to enter a decree in accordance with the prayer in plaintiffs' complaint.

ROSSMAN, J.

I dissent.

Everson v. *Board of Education*, 330 US 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392, spent unusual effort upon a case which was governed by the same principle of law that governs the case at bar. It stated the principle with clarity and sustained the constitutionality of the challenged statute. We should apply the same principle of law in this case and recognize as valid the statute under attack. Certainty of

law governing the relationship between the state and religious organizations, although difficult of expression, is peculiarly desirable. Confusion and controversy are certain to arise when the United States Supreme Court and this court interpret differently a constitutional principle that should have a single meaning. The Everson decision affords a good opportunity to achieve a high degree of certainty. It should not be cast aside; it should be embraced.

I will now state an additional reason for my dissent. It is commonly recognized that if more than one reasonable interpretation can be placed upon a statute which is challenged as invalid, one of which will sustain its constitutionality and the other of which will render it unconstitutional, the courts must accept the former. The most recent of our decisions which so held is *Federal Cartridge Corporation* v. *Helstrom*, 202 Or 559, 276 P2d 720. I believe that a simple reasonable interpretation can be placed upon ORS 337.150 (the act under attack) which will assure its validity.

A free textbook statute, applicable only to public elementary schools was enacted in 1931. Oregon Laws 1931, Chapter 61, § 1, p. 74. Oregon Laws 1941, Chapter 485, § 1, page 878, amended the act just cited by expanding its scope. The amended act read:

> "The board of directors of each and every school district in the state of Oregon hereby is authorized, empowered and directed, in the manner hereinafter provided, to provide textbooks, prescribed or authorized by law for the free use of all pupils residing in its respective districts and enrolled in and actually attending standard elementary schools. For the purpose of this act a school shall be standard when it meets the standards of the state board of education and all teachers engaged in classroom instruction in said school shall hold a valid Oregon teaching certificate of the proper teacher level. * * *"

It is clearly evident that the legislature, in making the amendment to the 1931 enactment, wished to improve the quality of the denominational schools. It, therefore, rendered textbooks available also to pupils who were enrolled in denominational schools that met qualifications for "standard elementary schools." But prior to the 1941 act a denominational school could select any textbook it preferred and use it in the classroom. Let us at this point assume that the members of the 1941 Legislative Assembly, in voting to extend the free use of textbooks to the pupils in denominational schools, thought that the pupils in those schools would receive superior instruction if the schools adopted the books chosen by the State Board of Textbook Commissioners (ORS 337.010 and 337.050); under those circumstances we surely would be forced to hold that the legislature had in mind the pupils and superior instruction for them—not financial gain for the schools. ORS 337.260 is a clear indication that the legislature is vitally concerned with the contents of the textbooks that are used in teaching the youth of Oregon. We see from the facts just mentioned that when a denominational school requests the local school board to render available to its pupils the use of free textbooks it must accept books chosen by the officials of the public school district and not by itself.

The majority concede that although churches and denominational schools pay no taxes they nevertheless receive many benefits from public moneys. For example, if a fire breaks out in a church the local fire department undertakes to extinguish it. That obviously is done because the church is a local asset and also because the fire, if left unextinguished, might spread to other structures. If a thief invades a church or denominational school he is prosecuted by the public authorities because if he were left to go on his way the property of others might be taken. However, in all instances of that kind the benefits to the religious organization is secondary or incidental. For example, the

street adjacent to a church or denominational institution may be improved at public expense, not for the purpose of conferring a benefit upon the church, but in order to enable traffic to move expeditiously. A church or a denominational school likewise may be enabled to hook up to the public sewer lines, not in order to confer a benefit upon the church, but because to do otherwise might cause an epidemic of disease to arise. The majority quote from a text writer as follows:

> "* * * Furthermore, a church may receive police protection when classed as property, tax exemption when classed as a non-profit institution, sewage connections when classed as a building, and yet be denied financial aid when classed as a religious institution * * *."

Classifications of that kind solve nothing. They represent wishful thinking whereby cases are solved according to preconceived ideas. To me, it seems we must in all instances endeavor to determine why the statute under attack was enacted. A good instance is ORS 421.035 which reads as follows:

> "There shall be appointed by the board two chaplains of the Oregon State Penitentiary, two chaplains of the Oregon State Correctional Institution and two chaplains of the MacLaren School for Boys. One shall be a non-Catholic clergyman, the other a Catholic clergyman of the archdiocese of Oregon, in each instance. They shall:
>
> "(1) Look after and attend to the spiritual wants of the inmates of the penitentiary, the correctional institution and the MacLaren School for Boys and of all other public institutions in Marion County, when called upon so to do by the inmates, rspectively.
>
> "(2) Visit their respective charges for the purpose of giving them religious and moral instructions * * *."

That enactment represents a clear appropriation of public funds for religious purposes. Yet, when the legislature enacted the statute it was not prompted by a desire to improve the finances of any church, religious denomination or clergyman. It was thinking of the unfortunate individuals who are confined in our penal institutions and was prompted by a hope that if a clergyman, Bible in his hand, called upon them a new light might enter their lives and turn them from law breaking to worthy aspirations. A Salvation Army band, clothed in tattered uniforms but playing some of the church's favorite hymns as it marches through skid row is a greater force for law compliance than a battalion of police officers.

As I have indicated, the act in question clearly can be deemed an educational act. Its purpose was to bring to the avail of the pupils in denominational institutions textbooks which the legislature favored. The legislature was not concerned with any church, but with the youth of Oregon and believed that textbooks chosen by the State Board of Textbook Commissioners would afford superior education to those selected by the denominational schools.

I add that a parochial school is in no sense enriched through the operation of the statute under attack. If, prior to the enactment of ORS 377.150 the parochial school did not provide for its pupils free textbooks then obviously ORS 337.150 did not relieve it of any burden. But, if prior to the enactment of ORS 337.150 the parochial school provided free textbooks, then the act under question does not give to the parochial school any books whatever. ORS 337.200(2) renders it clear that the books are entrusted to the pupil and are not the property of the school. In fact, ORS 337.190 states:

> "All textbooks purchased under ORS 337.150 are, and shall remain, the property of the school district. Upon receipt thereof, each of said books shall be immediately and properly labeled as the property of the school district."

ORS 337.200 renders it the duty of the Superintendent of Public Instruction to see to it that all of the books thus rendered available to the pupils are returned to the school board. Without further analysis I express my conclusion that the act under review is constitutional and that this court should adhere to *Everson* v. *Board of Education*, supra.

Order

(November 15, 1961)

This cause on September 6, 1961, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is error as alleged.

It Therefore Is Considered, Ordered and Decreed that the judgment and decree of the court below rendered and entered in this cause be and the same is in all things reversed and set aside and that the cause be remanded to said court with directions to enter a decree in accordance with the prayer in plaintiffs' complaint and in accordance with the opinion of the court herein.

It Further Is Ordered that appellants have and recover of and from respondents their costs and disbursements in this court taxed at $41.

APPENDIX B

IN THE CIRCUIT COURT FOR CLACKAMAS COUNTY, OREGON

On the 2nd day of February, 1960, Judge Holman entered a

Memorandum Opinion

of the Circuit Court, as follows:

This suit has been brought by certain taxpayers in School District 62C against the School Board of the district to prevent the Board from furnishing textbooks at public expense for the use of students at St. John the Apostle parochial school, which is operated within the district by the Catholic Church. O.R.S. 337.150 requires the Board to furnish free textbooks to all children attending schools maintaining standards as determined by the State Board of Education. St. Johns has been certified as maintaining these standards and the School Board has been providing free books. St. Johns gives instructions in the Catholic religion to its students. The evidence indicates and the Court finds that the sole purpose of the Church in conducting the school is to permeate the entire educational process of the children with the precepts of the Catholic religion. There is no serious factual dispute which the Court feels is in any way determinative of the issue.

The only issue in the case is the constitutionality of the Oregon Textbook Law as it provides for free textbooks for use of students of parochial schools. Does this law violate Article I, Section 5 of the Oregon Constitution and the First Amendment to the Federal Constitution as applied to the states by the Fourteenth Amendment? Article I, Section 5 of the Oregon Constitution provides:

"No money shall be drawn from the treasury for the benefit of any religious or theological institution * * *"

The First Amendment to the Federal Constitution states as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, * * *"

For the purpose of deciding this case I can determine no essential difference in the meaning of the provisions of the State and Federal Constitution. In effect, and they have been so construed, they mean that government can do nothing either to help or to hinder religion.

In the case of Cochran vs. Board of Education 281 U.S. 370, 74 L. Ed. 913, the Supreme Court of the United States held that a Louisiana statute providing free textbooks for children in all schools, parochial or otherwise, was constitutional. This decision rested on the power of the State to legislate for the public welfare. No question was raised or point was made of the application of the First Amendment of the Federal Constitution because it was not then recognized that the First Amendment had application to the states, but only the Federal Government.

Since then, the question of the application of the First Amendment was raised in the case of Everson vs. Board of Education 330, U.S. 1, 91 L. Ed. 711. This Court feels that the determination in that case is decisive of the question here. The United States Supreme Court, by a five to four decision, held constitutional a New Jersey statute which provided that the Board of Education of the public schools could pay the cost of transportation on public conveyances of children to certain parochial schools. This case held that the statute was an aid to education and public safety and therefore properly within the power of the state to legislate for the public welfare. The teaching of religion

in the schools to which the children were being transported was held incidental and not violative of the constitutional provision against government aid to religion.

A stronger case can be made for the unconstitutionality of paying the costs of transportation than can be made for the furnishing of free textbooks. The children are being transported to school for the purpose of religious as well as secular education. Therefore the expenditure is a direct benefit to the teaching of religion to the extent of at least a proportionate part of the cost. School books that are furnished free, it might be said, are used entirely in secular education and therefore give no direct aid to religion.

Plaintiffs have attempted to discount the Everson case by contending its was based upon the power of the State to provide for the safety of school children and save them from the hazards of traffic if required to walk to school while, in the present case, textbooks were furnished as actual tools for use in parochial schools. It is a distinction without a difference as affects our problem because the power of the legislative body in each instance, if it exists, must rest on its authority to legislate for the public welfare. In both instances something vital is being furnished for educational purposes. Transportation to a parochial school is a direct aid to the religion that is taught there. The most that can be said of secular textbooks is that they are an indirect aid to religion in that they help the operation of the educational process which is used for religious purposes. If a direct aid is permissible, certainly an indirect one must be.

In principle I cannot distinguish the decision in the Everson case from the present one and therefore hold the Oregon statute constitutional.

However, while I feel obligated to uphold the law as interpreted by the United States Supreme Court, I am not persuaded that its interpretation of the constitutional pro-

hibition is the correct one, and therefore make as vigorous a dissent as I am capable to the rulings of the Court in both the Everson and Cochran cases and to the ruling in this case, for the reasons hereinafter stated.

It is a matter of historical record that a large portion of the original thirteen colonies was settled by persons seeking to escape religious intolerance and coercion. They came so they could worship as they pleased and then in turn, in many instances, became as intolerant and oppressive of the religious beliefs of others as those from which they had sought to escape.

The Federal Constitution as adopted by the colonies had no provisions regarding religion in it except insofar as oaths of office were concerned. It was adopted, however, with the understanding that there would immediately be submitted for approval the matters now incorporated in the first ten amendments. They were immediately submitted and approved. The adoption of the First Amendment was the culmination of a long fight for religious freedom and tolerance which had been spearheaded by Madison and Jefferson.

It is extremely difficult for those of us who have been born and reared in the present atmosphere of religious tolerance which has been insured by the First Amendment to appreciate or visualize conditions which brought about its enactment and similar provisions in state constitutions. The dangers of allowing a government to aid any particular or all religions or to interfere with individual freedom of worship were to the colonists very real and ever present. They are so today if we in any way relax the provisions of the First Amendment. No one can be on the trial bench for any length of time and not have felt the religious pressures involved. Human nature has not changed since the time of Jefferson and Madison. Persons with missionary zeal still exist.

There is always pressure, under the guise of doing good and being helpful to mankind, to do the expedient thing in an individual instance and to relax the constitutional prohibition because there is no present intention to help religion. However, if the rule is relaxed in even the slightest degree, there are those who will seek to use the relaxation for the purpose of fostering their own religious beliefs or interfering with the beliefs of others.

How can the rulings in the Everson and Cochran cases as well as the decision in the present case be such a relaxation of the rule for the separation of church and state as to be dangerous? If these rulings are correct there is nothing in principle or at law which prohibits the legislature from authorizing the expenditure of public money to furnish teachers to the children at parochial schools as long as they teach only secular subjects, teaching supplies used exclusively for secular subjects, scientific laboratory equipment, athletic equipment, gymnasiums and classrooms as long as they are not used for religious purposes and as long as title remains in the public. I am not even sure that the teaching of religion in classrooms furnished at public expense would not be permitted because, if you can say that a child can be transported to school at public expense where he is taught religion and that religious teaching is only incidental to his transportation, you can say the same about furnishing classrooms that are used for both purposes. The proportionate cost between the religious and the secular is the same for classrooms as it is for transporting children to the classrooms. Classroom and transportation to school both promote public welfare. There is no difference in theory between the statute which provides that all children are entitled at public expense to free and equal use of textbooks and one which provides for the free and equal use of classrooms for them. If the criterion is whether the children are benefited and thus the general welfare benefited, the entire cost of the parochial schools at public expense can be justified.

In a situation where the public facilities and schools are disbursed among the Lutherans, Adventists, Catholic, Episcopalians, etc., each sect will be competing for the "lion's share" of public money and bringing religious and political pressure to get it, to the disadvantage of less powerful religious groups, each contending for requirements before funds are allotted which they can meet but which other less wealthy sects cannot. Things of this nature were feared by Madison and Jefferson. They desired to keep religious controversy out of public life by denying to every denomination any advantage from getting control of public policy.

Defendants and the intervenor attempt to take refuge in the words of the statute which say that the books are for "free and equal use of all pupils." They contend that this conclusively shows that the books are for the benefit of the children and not the schools and therefore not an aid to religion. If the books are furnished to the children alone and not the school, why then does the school have to meet certain governmental standards before the children who attend are entitled to free books? Is not a child attending a poorly operated school in need of free books just as much, if not more so, than one attending a school that is well run? Are the children of poor sects in any less need of free textbooks because their church cannot afford concrete fireproof buildings? The standards of the schools, not the needs of the children, determine their eligibility to free use of textbooks.

This Court believes that the questions of whether the benefit of free textbooks is to the child, the parents, or the school, whether there is a direct or indirect aid to the teaching of religion, whether it is a proper exercise of the public welfare power of the legislature, are all beside the point. There is only one question: Does the furnishing of free textbooks to the students of St. Johns help or foster the teaching of religion in any degree whatsoever? If it does, it is contrary to the First Amendment.

The answer is obvious. Anything that assists a religious sect to conduct a separate school where all instruction is permeated with religious overtones is an aid to religion. The proof in this case is conclusive that the sole purpose in maintaining the private school is to promote religion. It makes no difference whether books, teachers, equipment, transportation or buildings are furnished, nor does it make any difference to whom they are furnished. In truth, all are an integral part of the whole which makes up the school and the educational process. You cannot logically distinguish one from the other. They constitute the elements of an educational process permeated with religious purpose.

After all the arguments are made on both sides of the many facets of this perplexing problem, it is inescapable that the crux of the matter is the conflict between the power of the legislative arm of government to pass laws for the general welfare on the one hand, and the constitutional prohibition against governmental support of any or all religions on the other. No one can deny that the teaching of the Christian religion and Christian piety in any of its forms promotes the general welfare. Therefore, if the welfare power is paramount to the constitutional prohibition it would have been useless to include such a prohibition in the Constitution. It can only logically be concluded that the constitutional prohibition is paramount when a conflict occurs. This must be true even where the aid to public welfare is direct and the aid to religion is indirect. If this were not so the constitution could be successfully emasculated by indirection.

For the reasons above I accede to the opinion of the four dissenting justices in the Everson case and emphatically dissent from this decision which I am required to make as a result of the majority opinion of the United States Supreme Court.

An order may be presented to the Court for signature in conformance with this ruling.

On the 31st day of March, 1960, the Circuit Court entered its

Judgment

in which it was recited that, "the Court having heretofore rendered its Memorandum Opinion dated February 2, 1960, containing its findings and conclusions of the Court,

"IT IS HEREBY ORDERED, DECREED and DECLARED:

"That the Amended Complaint of the Plaintiffs be and the same is hereby denied, and the Defendants and the Intervenor have judgment against the Plaintiffs without costs to any of the parties."

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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,
Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,
Respondents.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

CHESTER BORDEAU,
Counsel for Petitioner,
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New York 5, N. Y.

WHITE & CASE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARCELLE KREISCHER,

Respondents.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

THE GLIDDEN COMPANY, petitioner, respectfully moves this Court for leave to file the annexed petition for rehearing of the order of this Court entered on October 9, 1961, 368 U. S. 814, insofar as it denied the petition for certiorari.

Rehearing is sought, as pointed out in the annexed petition, because

1. On March 5, 1962, this Court handed down its decision in *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, clearly establishing that the law applicable to the collective bargaining agreement involved in this case is federal substantive law in lieu of the local substantive law applied by the Court of Appeals in making its decision. See *Glidden Co.* v. *Zdanok*, 82 S. Ct. 1459, 1466 (1962). Such legal error in an area involving questions of widespread importance in the development

of a uniform federal labor law should be reviewed by this Court in the light of *Lucas*.

2. On July 16, 1962, the Court of Appeals for the Sixth Circuit in *Oddie* v. *Ross Gear and Tool Co.* handed down its opinion reversing the District Court of the Eastern District of Michigan which adhered to the ruling of the Second Circuit in *Glidden* and presenting a disagreement and conflict in the interpretation of collective bargaining agreements, between the Second Circuit and the Sixth Circuit which should be resolved by this Court.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58(2), the grounds upon which it is based arose after such time; and the Court has the power, in its discretion, to entertain the petition, *Roberts Sash & Door Co.* v. *United States*, 282 U. S. 829-30 (1930); *Duquesne Steel Foundry Co.* v. *Burnett*, 282 U. S. 830 (1930); *Douglas* v. *Willcuts*, 295 U. S. 722 (1935); *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 474 (1947); *Phillips Petroleum Co.* v. *Wisconsin*, 346 U. S. 934-35 (1954). And see *Bradley Mining Co.* v. *Boice*, 345 U. S. 932 (1953).

Dated: New York, New York
July 25, 1962

Respectfully submitted,

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WHITE & CASE,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1961

No. 242.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION, a Foreign Corporation,

Petitioner,

against

OLGA ZDANOK, JOHN ZACHARCZYK, MARY A. HACKETT, QUITMAN WILLIAMS and MARGELLE KREISCHER,

Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner, The Glidden Company, prays that this Court grant rehearing of its order of October 9, 1961, 368 U. S. 814. This order granted petitioner's petition filed with this Court July 21, 1961, limited to the question:

> "(d). Does participation by a Court of Claims judge vitiate the judgment of the Court of Appeals?",

a question involving the jurisdiction of the Court of Appeals for the Second Circuit in making its judgment herein.

Said order denied petitioner's writ of certiorari in all other respects.[1] The other questions presented by petitioner were:

[1] See *Lamar* v. *United States*, 241 U. S. 103, 110 (1916), relating to the general rule of this Court, that when this Court reverses a decision of the Court of Appeals wholly on the question of its jurisdiction, this Court remands the case to that court without passing on the merits, but that this Court has the power to, and, in exceptional cases, may determine the merits.

"(a) Are seniority rights in a given bargaining unit, arising under a collective bargaining agreement applicable to a specific plant which has been closed, transferable to another plant in the absence of language in the agreement expressing an intent that they should be so transferable?

(b) Do seniority rights and obligations under a collective bargaining agreement between an employer and a collective bargaining agent of its employees continue to exist after the employment has been duly terminated in good faith?

(c) Do seniority rights and obligations under a collective bargaining agreement between an employer and a collective bargaining agent of its employees continue to exist after that agreement has been duly terminated in good faith?"

On June 25, 1962, this Court, under the limited writ of certiorari, affirmed the judgment of the Second Circuit. *Glidden Co.* v. *Zdanok*, 82 S. Ct. 1459 (1962).

Reasons for Granting Rehearing and Issuing the Writ.

1. At the time of this Court's order of October 9, 1961, there existed no clear holding determining whether state or federal law was properly applicable in those suits involving the interpretation of collective bargaining agreements that were not brought under section 301 of the LMRA.

On March 5, 1962, this Court in *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, held that federal substantive law, in lieu of local substantive law, is properly applicable in suits involving the interpretation of collective bargaining agreements brought in state courts (or in federal courts on diversity jurisdiction) by employers or unions.

Federal substantive law must be applicable to suits brought by individual employees for any other result would create the "disruptive influence" created by "the possibility that individual contract terms might have different meanings under state and federal law", 369 U. S. 95, 98.

As Professor Archibold Cox put it:

> "It would create hopeless confusion to have one rule applicable to suits by a labor organization and another to suits by individuals. Uniformity could be achieved under a body of federal substantive law only by holding that the rules of decision developed by the federal courts were binding on state tribunals."[2]

Mr. Justice HARLAN, in his opinion of June 25, 1962, in this case, noted that the majority of the Court of Appeals decided the case as a matter of New York law. 82 S. Ct. 1459, 1466. He stated:

> "The Court of Appeals for the Second Circuit sat to determine a question of state contract law presented for its decision solely by reason of the diverse citizenship of the litigants."[3]

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[2] Cox, *Federalism in the Law of Labor Relations*, 67 Harv. L. Rev. 1297, 1339 (1954). *Accord*, Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N. Y. U. L. Rev. 362, 373 (1962).

In an article by Professor Benjamin Aaron, entitled "Reflections on the Legal Nature and Enforceability of Seniority Rights", appearing in the Harvard Law Review for June, 1962, (Volume 75, No. 8) commencing page 1532, there is an illuminating discussion (page 1542, *et seq.*) of *Zdanok* v. *Glidden*, 288 F. 2d 99 (1961), supporting the statement made by Professor Cox, pages 1551-2, note 69.

[3] One of the major arguments made by respondents in opposition to the granting of the petition was that *Glidden* involved an interpretation of state law, contrary to the contention of petitioner. See brief of respondents in opposition to petition, at page 9.

In a footnote 8 to this sentence Mr. Justice HARLAN stated:

> "Under our limited right of certiorari, 368 U. S. 814, we have no occasion to consider whether federal law is more appropriately the measure of the employer's obligation. Cf., *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95."

Before *Lucas*, *Glidden* appeared to be merely a disagreement between the District Court and the Court of Appeals as to the proper interpretation of New York law, a type of case in which this Court has often expressed its extreme reluctance to "set its view of [state] law against that of the Court of Appeals," *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 209 (1956).

The majority in *Glidden* (Chief Judge Lumbard dissenting), sitting "to determine a question of state contract law", ignored applicable federal law reflected in the decisions of the Courts of Appeal in the Fifth, Sixth, Seventh and Tenth Circuits in the cases cited on page 5 hereof. The rulings in these cases are in conflict with *Glidden* as to the nature and scope of seniority rights.

Lucas makes it clear that *Glidden* involves a question of federal substantive law and should *not* have been decided by the Court of Appeals on the basis of an interpretation of New York law.

There are now grounds which have arisen after the denial on October 9, 1961, 368 U. S. 814, of the writ of certiorari, which warrant a rehearing of *Glidden* involving federal substantive labor law questions, as yet unsettled by this Court, exceedingly important to hundreds of com-

panies contemplating plant movement and to thousands of their employees.[4]

2. Leaving the decision of the Second Circuit unreviewed would seem to be justified only if federal law is, or should be, substantially the same as New York law as interpreted by the majority of the Court of Appeals. However, Chief Judge Lumbard, recognizing that federal law was applicable, felt himself compelled to agree with the district court and to dissent from the majority's holding.

The ruling of *Glidden* is clearly inconsistent with the rulings made by other federal circuit courts which considered the nature and scope of seniority rights and held that such rights do not survive the expiration of the agreement creating them or the termination of the relationship of employer and employee and are subject to alteration or destruction by the collective bargaining agent. *Local Lodge 2040 International Association of Machinists* v. *Servel*, 268 F. 2d 692, 697 (C. A. 7th Cir. 1959), *cert. denied*, 361 U. S. 884 (1960); *System Federation No. 59 of Ry. Employees* v. *La. A. Ry. Co.*, 119 F. 2d 509, 515 (C. A. 5th Cir. 1951) *cert. denied*, 314 U. S. 656 (1941); *Elder* v. *New York Central R. R. Co.*, 152 F. 2d 361, 364 (C. A. 6th Cir. 1945); *Sheils* v. *Baltimore & Ohio R. R.*, 154 F. Supp. 917 (S. D. Indiana, Indianapolis Division 1957), page 925, aff'd 254 F. 2d 863 (C. A. 7th Cir. 1958); *McMullans* v. *Kansas, Oklahoma & Gulf Ry. Co.*, 229 F. 2d 50, 53 (C. A. 10th Cir. 1956).[5]

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[4] See, *e. g.*, the list of *amici* reported at 368 U. S. 814.

Glidden itself is defendant in a suit commenced on June 27, 1962 in the United States District Court for the Southern District of New York by 155 other former employees. See, *Alexander* v. *Glidden*, Civil Action No. 62-2244. These 155 plaintiffs are plaintiffs in earlier suits in the New York Supreme Court, New York County, i. e., Alexander *et al.*; Balch, *et al.*, and Hackett in which Glidden, as defendant, has answered.

[5] See, "Termination of Colleetive Bargaining Agreements—Survival of Earned Rights", 54 Northwestern L. Rev. 646, 649, 651 (Nov.-Dec. 1959).

In *Trailmobile Co.* v. *Whirls*, 331 U. S. 40 (1947), in a footnote by Mr. Justice Rutledge, at page 53 of the opinion of the Court it is stated:

> "Seniority arises out of contract or statute. An employee has 'no inherent right to seniority in service'."[6]

In *Oddie* v. *Ross Gear and Tool Co.*, Chief Judge Miller in an opinion handed down on July 16, 1962 reversed the district court (195 F. Supp. 826, E. D. Mich. 1961).[7] In this opinion Chief Judge Miller stated (appendix, a-11):

> "Nor do we think there is merit in the contention that plaintiffs' seniority rights at the Detroit plant are 'vested' rights which cannot be cut off or defeated by the relocation of the plant in Tennessee."

He cited with approval *Servel, System Federation No. 59* and *Elder* in support of his statement. However, he pointed out (appendix, a-12):

> "Whether such [seniority] rights continue in existence beyond the end of the current bargaining agreement is another question, which we are not now con-

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[6] "In the absence of specific language in the collective agreement to the contrary, however, the rule has always been—as stated in the leading case of *System Fed'n 59* v. *Louisiana & Ark. Ry.*—that with reference to seniority, 'collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights created and arising under the contract beyond its life, when it has been terminated in accordance with its provisions.' Similarly, in *Local Lodge 2040, Int'l Ass'n of Machinists* v. *Servel, Inc.*, the court declared that 'seniority rights depend upon an employer-employee relationship; they do not guarantee such a relationship but merely define the rights of an employee when that status is in existence. . . .'" Aaron, *Reflections on the Legal Nature and Enforcibility of Seniority Rights*, 75 Har. L. Rev. 1532, 1542 (June 1962).

[7] A copy of the opinion is annexed in the appendix for the convenience of the Court.

sidering. Clearly, the word 'vested' is not the correct word to describe these rights, in that there are a number of ways in which such rights may be terminated or lost."

In *Glidden* the collective bargaining agreement provided

"ARTICLE I *Recognition*

"1. *The Company recognizes the union as the exclusive representatives* of all hourly paid production, maintenance and service *employees of the Company at the plant facilities named above* for the purpose of collective bargaining with respect to rates of pay, hours of employment, fringe benefits, and other terms and conditions of employment." (Emphasis added.)

In the preamble to this agreement it was stated that the agreement was made by Glidden

"for and on behalf of its [the Glidden Company] plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."

The *Ross* collective bargaining agreement provided

"*Recognition*

"1. *The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit* for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph." (Emphasis added.)

In *Glidden*, the majority (Chief Judge Lumbard dissenting), ignoring the provisions of Article I(1) but refer-

ring only to the preamble in the *Glidden* agreement, concluded that the agreement was not limited geographically to Elmhurst, Long Island, as provided in Article I(1) and in the preamble thereof.

Chief Judge Miller concluded that Article I(1) in the *Ross* agreement was limited geographically to the plants "located within the city limits of Detroit."[8]

The provisions contained in the *Glidden* and *Ross* agreements with respect to geographical application, it is clear, are basically the same.

It is clear that there is conflict between the Second and Sixth Circuit Courts of Appeals in the interpretation of these basically identical clauses in collective bargaining agreements which have arisen since the denial of the petition for certiorari by this Court on October 9, 1961. "The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling." *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95, 104.

Theories of property rights and principles of contract interpretation that permit employees whose seniority rights were created at one plant by one union to enforce those

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[8] The district judge in *Ross* held that seniority rights were "vested" (195 F. Supp. 826, 828) and that the agreement contained no effective geographic limitation (*Id.* 829-31) citing only the Court of Appeals opinion in *Glidden*. On the other hand, the district judge in *Glidden* held that the agreement contained an effective geographic limitation (185 F. Supp. 441, 448-49, as did Chief Judge Lombard, 288 F. 2d 99, 105).

Differing interpretations concerning the nature and scope of seniority rights as "vested" or "not vested", seems to have compelled contrary conclusions as to the geographic scope of the agreement thus indicating a basic disagreement and conflict between the Circuit Courts of Appeal as to a federal substantive law to be applied in an area where local substantive law is inapplicable if at variance with federal law. *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95.

rights, after expiration of the agreement and closing of the plant, at another plant where a different union is, or may become the exclusive bargaining agent (as happened in *Glidden*), are incompatible with a federal labor policy[9] that is suspicious of individual advantages not obtained by the appropriate collective bargaining representative. See *J. I. Case Company* v. *N. L. R. B.*, 321 U. S. 332, 337-38 (1944). "It would indeed be an anomaly if the National Labor Relations Board would hold a contract not applicable to a new plant—i.e., not a contract bar—but a court would hold the seniority rights arising under it vested and in effect", Lowden, *Survival of Seniority Rights Under Collective Agreements: Zdanok v. Glidden Co.*, 48 Va. L. Rev. 291, 296-97 (1962).

Thus, the rulings in *Glidden* and *Ross* have resulted in a conflict as to the interpretation of collective bargaining agreements and have created basic conflicts with the decisions of other circuits and with the objectives of national labor policy. "To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court." *Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962). "Because of the various views expressed as to controlling legal principles in the decisions discussing such arrangements, we granted certiorari. . . ." *Commissioner* v. *Tower*, 327 U. S. 281, 284 (1946).

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[9] See, *International Ladies Garment Workers Union* v. *National Labor Relations Board*, 366 U. S. 731 (1961).

Conclusion.

For the reasons set forth above and in the petition for certiorari, it is respectfully urged that rehearing be granted and that, upon such a rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Dated: July 25, 1962.

Respectfully submitted,

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Counsel for Petitioner,
14 Wall Street,
New York 5, N. Y.

WHITE & CASE,
Of Counsel.

Certificate of Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2) of the rules of this Court.

Dated: July 25, 1962.

CHESTER BORDEAU,
Counsel for Petitioner,
14 Wall Street,
New York 5, N. Y.

Appendix

Opinion.

No. 14712.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

JAMES ODDIE, EDWARD CWIERTNIEWICZ, JOHN PENZAK, OSCAR KING, HARRY C. BREMMER,
Plaintiffs-Appellees,

v.

ROSS GEAR AND TOOL COMPANY, INC.,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided July 16, 1962.

Before: MILLER, Chief Judge, WEICK and O'SULLIVAN, Circuit Judges.

MILLER, Chief Judge. The plaintiffs, who are citizens of the State of Michigan and are employees of the Gemmer Manufacturing Company Division of the defendant, Ross Gear and Tool Company, Inc., an Indiana corporation, are members of Local 80 of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW (AFL-CIO), hereinafter referred to as the "Union," the bargaining representative for said employees. They filed this action in the District Court on June 15, 1961, on behalf of themselves and other employees similarly situated for a declaration of rights with respect to their seniority or recall-to-work rights under the collective bargaining agreement then in effect between the

Union and the Gemmer division of the defendant. Jurisdiction is based upon diversity of citizenship and the amount in controversy. *Section 1332(a), Title 28, United States Code. McGarry* v. *Lentz.* 9 F. (2) 680, 683, affirmed, 13 F. (2) 51, C. A. 6th, cert. denied, 273 U. S. 716.

The material facts, which are not in dispute, are as follows. The defendant is a manufacturer of steering gears, with operations in the United States, England, France, Brazil, Australia, Germany and Spain. The Gemmer Manufacturing Company was an independent corporation until 1956 when it was purchased by the Ross Gear and Tool Company. Its plant was located at Detroit, Michigan. Since 1936 the Union has represented the employees at this Detroit plant. Although there were collective bargaining contracts prior to 1948, we are here concerned with only the collective bargaining contracts of 1947, 1951, 1955 and 1958 and the negotiations in connection therewith. The current contract, hereinafter referred to more in detail, was entered into December 19, 1958, and was due to expire on October 1, 1961, several months after this action was filed.

Prior to the filing of this action, the defendant had a plant in Lafayette, Indiana, known as "Ross Gear and Tool Company, Inc.," hereinafter called the Lafayette plant, and a plant in Detroit, Michigan, known as "Gemmer Manufacturing Company, a division of Ross Gear and Tool Company, Inc.," hereinafter called the Detroit plant. The Detroit plant was located on Mt. Elliott, between Milwaukee and Harper.

On January 13, 1961, the defendant posted a notice to the employees at the Detroit plant, signed by John E. Jarrell, President, reading as follows:

"To All Our Employees:

"The Ross Gear and Tool Company has formed a new division; 'The Tennessee Division of the Ross Gear and Tool Co., Inc.'

"This division is building a plant at Lebanon, Tennessee to manufacture new products in addition to some products which are now manufactured at Lafayette and Detroit.

"The pitman arm manufacturing of both Lafayette and Detroit is being transferred to the new division.

"Economic studies are being made on the basis of present and potential business in order to determine if the manufacturing of additional products should be combined in existing divisions or transferred to the new division."

In a letter to defendant dated January 25, 1961, Ken Morris, Co-Director UAW Region 1, stated that the notice of January 13, 1961, had caused much concern on the part of the employees as it pertained to their continued job security. He wrote:

"Because it is evident that some jobs are leaving the Detroit Plant for the Lebanon Tennessee Plant, we are requesting that any employee affected because of the transfer of a job, be given an opportunity to go to Lebanon with the job.

"We feel you will agree that the long service given by an employee to the company should be allowed to continue if he is willing to follow the operation to the new company location."

He asked for a meeting at the Company's earliest convenience "to reach an understanding on the methods and principle of employees right to transfer with their jobs."

After an exchange of several letters, in which the Company took the position that there was no need for a meeting and that it might be more appropriate to hold such a meeting after the Company had completed certain studies, Morris wrote on February 22, 1961, that if he did not hear from the Company in the next forty-eight hours indicating a willingness to arrange a meeting, the Union would file

immediate complaint with the National Labor Relations Board, plus taking such other legal steps necessary to require the Company to bargain in good faith with the organization which represented the Company's employees. By letter of February 27, 1961, the Company agreed to the requested meeting, suggesting the date of March 8, 1961, as the date therefor.

In the meantime, on February 6, 1961, defendant posted a second notice to the employees at the Detroit plant, signed by G. Bissett, who was Vice-President of the Gemmer Division, which referred to recent newspaper and radio stories which suggested that the defendant intended to move its entire Detroit operation to Lebanon. This notice concluded with the following:

> "The economic studies referred to in the January 13 announcement are still in progress. Should these studies indicate the advisability of moving or combining the production of other products, either here or at other plants, you will be advised by Mr. Jarrell or myself."

On March 3, 1961, the defendant posted a third notice to the employees at the Detroit plant, signed by its President, which stated that the purpose of the notice was to help clarify some of the conflicting rumors which were rampant in the factory and even in the city. The notice stated that in recent years the Company had increasing difficulty in meeting competition to the point where some items were being produced at a price that was not profitable in view of the production costs, and that it was necessary that the management of the Company do everything that could be done to produce the Company's products at the lowest possible production cost; that the former Gemmer Manufacturing Company was having a very unfavorable profit experience when it was acquired by the defendant in 1956, and that while the defendant hoped that it could do

much better with Gemmer's facilities than Gemmer had done, this had not proven to be the case, with the exception of one year, and that the rapidly changing economic and competitive conditions in general and those in Gemmer's field in particular, had complicated the situation to such an extent as to make it appear that the Company would never be able to operate profitably in the Detroit plant. It also stated that many Southern states had authorized cities to subsidize the building of new manufacturing plants; that the construction of the new Tennessee plant was being subsidized by the City of Lebanon; that other advantages, such as lower taxes, lower operating costs, and the like, were also offered; that the Company planned that new products would be put in the new plant and that studies would be made to see what other items might be produced there; that the Company was in the process of completing these studies, but did not presently have definite conclusions to announce; that it was a possibility that a major portion of the items then being produced in the Detroit plant would be transferred to the Lebanon plant; and that the Company would consider all the factors carefully and would not cease operations at Detroit if it could be avoided.

The meeting between the defendant and the Union took place on March 9, 1961. At the meeting the defendant did not agree to the Union's request that any employee affected because of the transfer of the job be given the opportunity to go to Lebanon with the job and his seniority rights pertaining thereto. The defendant took the position that employees whose jobs were eliminated would be treated the same as other employees in the past had been treated in job elimination situations, that is, they would be given the rights provided for them in the seniority provisions of the current contract between the Company and the Union; that these employees, consistent with their seniority rights, would be retained at work in the Detroit plant; that the Company did not plan to offer reemployment at the Tennessee Division to the employees whose jobs at the

Detroit plant were eliminated, and that in the event employees were laid off as a result of the transfer, the laid-off employees would not be the occupants of the transferred jobs.

On May 9, 1961, Morris wrote to the Company stating that the Company was under a duty to recall at Lebanon employees laid-off in Detroit as a Federal Court of Appeals recently made clear in *Zdanok* v. *Glidden Co.*, 288 F. (2) 99, C. A. 2nd. He closed this letter by stating:

> "This is to advise you that if you persist in your present determination to breach this duty, legal action will be taken."

On May 22, 1961, the defendant posted a notice to the employees at the Detroit plant, signed by its President, which referred to the establishment of the Lebanon plant and the study which had been given to the overall picture, and advised that, in view of the fact that it had become obvious that the Detroit operation could not be expected to be a profitable one on a competitive basis, the defendant had decided, with reluctance on the part of its officials, to terminate the Detroit operation of the Gemmer Division of the Company. The notice stated that the Company expected to start the transfer of operations by July 1, 1961, and that on or about September 2, 1961, it expected to discontinue production at Detroit and commence moving the remainder of the production and maintenance equipment.

Thereafter, the plaintiffs filed their complaint in the present action, which set out the foregoing facts and took the position that the seniority rights of the defendant's Detroit employees under the 1958 collective bargaining agreement survived the transfer of defendant's Detroit operations to Lebanon, and that when defendant commenced at Lebanon its operations transferred from Detroit, it would be under a duty to honor at Lebanon the seniority rights of its Detroit employees and recall them

to work, in accordance with those rights. They also contended that these seniority rights would continue in existence and would be applicable to operations at the Lebanon plant after October 1, 1961, at which time the current collective bargaining agreement terminated. Defendant by its answer took the position that the 1958 bargaining agreement, under which the plaintiffs claimed the seniority rights in question was applicable by its express provisions only to the Detroit plant and that, accordingly, it had no application to the operations of the defendant at its plant in Lebanon, Tennessee. The Company also took the position that, even if the collective bargaining agreement was applicable to the Lebanon operations, it was only applicable until October 1, 1961, at which time the bargaining agreement terminated by its express terms.

This presents for consideration the provisions of the collective bargaining agreement which pertain to these opposing contentions. The 1958 agreement, in effect at the time, provides as follows in its opening paragraphs:

"AGREEMENT

"THIS AGREEMENT is entered into this 19th day of December, 1958, by and between GEMMER MANUFACTURING COMPANY (of Detroit, Michigan), which is a division of Ross Gear and Tool Company, Inc. (a corporation of Lafayette, Indiana), and which Gemmer is hereinafter referred to as the 'Company,' and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT and AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW (AFL-CIO), and LOCAL 80, THEREOF, hereinafter referred to as the 'Union.'

"WHEREAS, the parties to this agreement desire to promote the spirit of harmony and cooperation between them and insure the most efficient operation of the Company's plant, the following agreement is entered into:

Opinion.

"RECOGNITION

"1. The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph."

There is no dispute between the parties that paragraphs 17-40 of the agreement, under the heading of "Seniority" give certain seniority and recall-to-work rights to the plaintiffs and other employees of the Gemmer Company in the Company's operation of the Detroit plant. What is presented for decision is whether these seniority and recall-to-work rights are applicable to the defendant's operation of its plant at Lebanon, Tennessee, and, if so, whether they ceased to exist or expired with the expiration of the collective bargaining agreement on October 1, 1961.

The District Judge rendered an opinion on July 5, 1961, which is reported at 195 F. Supp. 826, in which he held that the 1958 collective bargaining agreement granted employees certain benefits and rights that became "vested" in the sense that they could not be unilaterally denied without their consent or other agreed means, such as the right to discharge; that these rights extended beyond the time limitations of the collective bargaining agreement; that these rights applied to a "plant" regardless of physical location under the contract and previous contracts; and that these rights included, among other things, seniority rights for the purpose of rehiring after layoff (which could go beyond an anniversary date) as provided in the agreement. The District Judge said that he felt bound by the ruling and reasoning of the *Glidden* case, *supra*, which was the case referred to in the Union's letter of May 9, 1961,

and the contract being not to the contrary, the defendant had an obligation and duty to rehire on the basis of seniority those employees laid off in Detroit when that plant's operations were removed to Lebanon, Tennessee. An order declaring the rights of the parties in accordance with the views expressed in the opinion was entered July 7, 1961, from which this appeal was taken by the defendant.

Plaintiffs, in support of the judgment, rely strongly upon the ruling of the Court of Appeals for the Second Circuit in *Zdanok* v. *Glidden Co., supra,* 288 F. (2) 99, and the reasoning of the District Judge in the present case, particularly the statement in his opinion that "The Gemmer Division plant is the same plant wherever it is moved, in spite of the fact it might be known by a different name. Mere change of form will not change the substance, nor will mere change of location. This is the same plant, same machinery and equipment, same operation, same officers and supervisors, but in a new climate." They urge upon us that it would be unreasonable under such circumstances to have the agreement applicable to the plant while operating in Detroit and to hold that it is not applicable to the same plant merely because it has been moved to Tennessee.

Defendant relies upon the express wording of the agreement, which it contends specifically provides that the agreement is applicable only to a plant located within the city limits of Detroit; that there are good and valid reasons for restricting the application of the agreement to its plants within the city limits of Detroit, but, irrespective of that, in the absence of the restriction being contrary to public policy, it is of no concern to the Court whether the restriction is reasonable or unreasonable when the parties have expressly contracted for that result.

The collective bargaining agreement provides that the Company recognize the Union as the exclusive representative "of its employees in its plant or plants which are located in that portion of the greater Detroit area which is

located within the city limits of Detroit for the purposes of collective bargaining. . . ." This is plain, unambiguous language. The agreement gave seniority and recall-to-work rights to employees in the defendant's plants which were within the city limits of Detroit. It gave no such rights to employees of a plant in Tennessee. Plaintiffs concede that the agreement is not applicable to employees in a company plant in Michigan, even though only a short distance outside of the city limits of Detroit. They concede that the agreement would not be applicable to employees in a new plant in Tennessee other than the Gemmer plant. We see no material distinction, with respect to geographical location, between a new plant in Tennessee and the relocation of the Gemmer plant in Tennessee. In both cases the plant, new or old, is not in the city limits of Detroit, as limited by the agreement. It is true, as the District Judge pointed out, that the plant in Tennessee has the same machinery and equipment, the same officers and supervisors, and the same operation, but, as also stated by him, it is in a "new climate," which of course recognizes that it is not in the city limits of Detroit, but in Tennessee. Whether it would be advisable or reasonable under the existing circumstances to have the agreement apply to the plant in Tennessee is not for the Court to decide. We must construe the contract as it is writen, rather than make a new contract for the parties. *Standard Oil Co.* v. *Ogden & Moffett Co.*, 242 F. (2) 287, 291-292, C. A. 6th; *Dura Electric Lamp Co.* v. *Westinghouse Electric Corp.*, 249 F. (2) 5, 7, C. A. 3rd; *Jenkins* v. *King*, 224 Ind. 164, 65 N. E. (2) 121, 163 A. L. R. 397; *Babcock Coal & Coke Co.*, v. *Brackens Creek Coal Land Co.*, 128 W. Va. 676, 37 S. E. (2) 519, 163 A. L. R. 871.

We are not in agreement with plainiffs' contention that the agreement was for the benefit of the employees of the Gemmer Company, wherever it might be, in Detroit or in Tennessee, and that the reference in the agreement to the city limits of Detroit was merely a reference to where

the Gemmer Company was then located. This ignores the fact that the reference is not to the employees of the Gemmer Company but to the Company's employees "in its plant or *plants*" within the city limits of Detroit. (Emphasis added.) The fact that the beneficiaries of the contract are specifically designated as the employees in all of the Company's plants within the city limits of Detroit instead of merely the employees of the Gemmer Company in Detroit makes it plain that the words were not used for the purpose of merely giving the present location of the Gemmer Company.

This argument is essentially the one upon which the Court of Appeals for the Second Circuit rested its decision in *Zdavok* v. *Glidden Co., supra.* But in that case there was a specific reference to one plant only, the address of which was specifically given, and there was no specific geographical limitation such as is contained in the agreement in the present case. In that respect the agreement in the *Glidden Company* case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case. In *Metal Polishers, etc.* v. *Viking Equipment Co.*, 278 F. (2) 142, C. A. 3rd, also relied upon by the plaintiffs, it appears that the new location of the plant involved was still within the geographical limits referred to in the collective bargaining agreement, which, of course, is vitally different from the situation which we are considering in the present case.

Nor do we think there is merit in the contention that plaintiffs' seniority rights at the Detroit plant are "vested" rights, which cannot be cut off or defeated by the relocation of the plant in Tennessee. The argument is based upon the theory that through years of employment at the Gemmer plant they have "earned" such seniority rights in accordance with the terms of the agreement, which cannot be cancelled or taken from them by unilateral action on the part of the defendant, at least during the life of the bar-

gaining agreement. Whether such rights continue in existence beyond the end of the current bargaining agreement is another question, which we are not now considering. Clearly, the word "vested" is not the correct word to describe these rights, in that there are a number of ways in which such rights may be terminated or lost. Section 31 of the bargaining agreement provides for loss of seniority rights for any one of nine separate reasons, including quitting work or being discharged and not being reinstated through the grievance procedure. If an employee should die, his "earned" seniority rights becomes worthless and are not enforceable rights against the employer. If the company discontinues in business and terminates its operations, the employees' seniority rights are terminated. *Local Lodge, 2040, etc.* v. *Servel, Inc.*, 268 F. (2) 692, 697-699, C. A. 7th. It appears to be well settled that such rights of the individual employees can be bargained away by the Union representing them in collective bargaining. *Elder* v. *N. Y. Central R. Co.*, 152 F. (2) 361, C. A. 6th; *System Federation No. 59, etc.* v. *Louisiana & A. Ry. Co.*, 119 F. (2) 509, 515, C. A. 5th. It was so recognized in *Zdanok* v. *Glidden Co., supra*, 288 F. (2) 99, 103 C. A. 2nd.

Accordingly, we do not have the question of whether plaintiffs' "vested" rights can be validly terminated by relocation of the plant in Tennessee. Rather, it is the question of what rights, if any, the plaintiffs have under the express provisions of the bargaining agreement upon the relocation of the plant in Tennessee. If no rights were acquired under the bargaining agreement as employees at the Tennessee plant, it necessarily follows that no rights have been cut off. If the 1958 bargaining agreement bargained away the employees' seniority rights which they had at the Detroit plant in the event they sought employment at a company plant in any city other than Detroit, they lost their rights through operation of the contract. *Elder* v. *N. Y. Central R. Co., supra*, 152 F. (2) 361, C. A.

6th; *System Federation No. 59, etc.* v. *Louisiana & A. Ry. Co., supra*, 119 F. (2) 509, 515, C. A. 5th. As heretofore pointed out, the only question which we have is what is the proper construction to be given to the 1958 agreement between the parties. Under our construction of the agreement the employees acquired no seniority rights under the 1958 agreement as employees at the Tennessee plant. Since no rights were acquired, we do not reach the question of any rights being cut off by unilateral action on the part of the defendant, either during the existence of the bargaining agreement or after its expiration.

The construction which we are presently giving to the collective bargaining agreement appears to be in accord with the construction also given to it by the Union until shortly before the filing of this action. In August 1947 Gemmer Manufacturing Company, predecessor of the Gemmer Company herein, entered into a collective bargaining agreement with the Union, in the preamble of which the address of Gemmer Manufacturing Company was given as 6400 Mt. Elliott Avenue, Detroit, Michigan. The recognition clause recognized the Union as the exclusive representative of its employees without any other designation or limitation of geographical area. The company maintained an experimental plant on Nine Mile Road just outside the city limits of Detroit. In the 1951 negotiations the Union, apparently recognizing that the 6400 Mt. Elliott Avenue address of the company in the 1947 agreement made it inapplicable to the experimental plant, and wishing to include the experimental plant in the 1951 agreement, proposed to delete the 6400 Mt. Elliott Avenue address from the preamble of the agreement and to change the wording of the paragraph dealing with recognition of the Union so as to make the agreement apply to all employees of Gemmer Manufacturing Company in the greater Detroit area. The company rejected this proposal but did change the wording of the recognition clause so as

to apply to its employees in "its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit."

This same language was again used in the bargaining agreement executed September 1, 1955, and expiring June 1, 1958. During the term of the 1955-1958 bargaining agreement Gemmer Manufacturing Company was acquired by the defendant.

In the negotiations leading up to the 1958 bargaining agreement the Union again proposed that the recognition clause be changed so as to apply to the Company's employees in the greater Detroit area, not restricted to the city limits. It also submitted a proposal that in the event the company moved its operations to other locations, the Union would be recognized for the purpose of collective bargaining on the matters of wages, hours and conditions of employment and that certain problems involved, including moving costs and seniority transfers, be subject to negotiations. These proposals were rejected and the language in the 1955 agreement was again used.

It will be noticed that following the first notice to employees on January 13, 1961, about the new Tennessee division, the Union in its letter of January 25, 1961, to the Company made no claim of seniority rights with respect to employment at the Tennessee plant under the 1958 agreement. It merely requested that any employee affected because of the transfer of a job be given an opportunity to go to Lebanon with the job and stated, "We feel you will agree that the long service given by an employee to the Company should be allowed to continue if he is willing to follow the operation to the new company location." It was not until May 9, 1961, following the decision in *Zdanok* v. *Glidden Co., supra,* on March 28, 1961, that the Union changed its "request" into a claim that such rights existed under the ruling in that case. This clearly seems to be a new and different construction of the agreement from that

given by the Union to the agreement before this case was decided.

One of the fundamental rules in the construction of contracts is for the court to give great weight to the construction which the parties themselves have given to the contract as shown by their actions thereunder. *Reynolds Metals Co.* v. *Skinner,* 166 F. (2) 66, 71, C. A. 6th, cert. denied, 334 U. S. 858; *Begnaud* v. *White,* 170 F. (2) 323, 325-326, C. A. 6th.

The judgment of the District Court is reversed and the case remanded to the District Court with instructions to enter a judgment declaring the rights of the parties in accordance with the views expressed herein.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 242

IVAN B. CARLSON,

Petitioner,

v.

WILLIAM H. DICKMAN, HAROLD E. SALISBURY, LAWRENCE SMELSER and SCHOOL DISTRICT No. 62C, *et al.*

RESPONDENTS' MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI

This memorandum is submitted in respect to the Petition for a Writ of Certiorari that seeks to review a determination by the Supreme Court of Oregon. That court held unconstitutional a state statute providing that textbooks purchased at public expense be provided to church or parochial schools. The petitioner, who was permitted by the state courts to intervene in the suit, is the father of children attending a parochial school in Oregon.

The Supreme Court of Oregon expressly refused to follow the decision of this Court in *Cochran* v. *Louisiana State*

Board of Education, 281 U. S. 370 (1930). We believe that under the decisions of this Court interpreting the First Amendment which have been handed down since the *Cochran* case, the decision in that case cannot stand today. For that reason we would welcome a review by this Court of the decision of the Oregon Supreme Court in the present case.

However, the Oregon Supreme Court based its decision not only on the First Amendment but also on the Oregon state constitution. Under well-settled rules, this adequate non-federal ground precludes review by this Court. Recognizing this, the petitioner seeks review by asserting that the decision of the Oregon Supreme Court itself deprives him of rights secured by the Federal Constitution. He argues that a state court decision which invalidates that part of a statute providing for free textbooks for use in church or parochial schools without invalidating that part of it which provides for free use in secular non-public schools denies to parents of children attending the former schools the equal protection of the laws, deprives them of liberty and property without due process of law and violates the free exercise of religion guaranty of the First Amendment.

This approach is not entirely unprecedented. In *Tudor* v. *Board of Education of the Borough of Rutherford*, 14 N. J. 31, the Supreme Court of New Jersey reversed a lower court decision and held unconstitutional a resolution permitting the distribution of the Gideon Bible in the public schools of the state. The Gideons International, publisher and distributor of the Bible, which likewise had been permitted to intervene by the trial court, petitioned this Court for review on the ground that the judgment of the New

Jersey Supreme Court deprived it of rights secured by the First Amendment. This Court, however, denied the petition for a writ of certiorari. *The Gideons International* v. *Tudor*, 348 U. S. 816 (1954).

We do not challenge petitioner's assertion in the present case that although the claims herein raised were first asserted in the petition for rehearing presented to the Oregon Supreme Court they were, despite that, timely raised. Indeed, we do not in fact oppose the granting of the requested writ of certiorari. Nevertheless, we feel it our duty to make the following observations.

The petitioner does not claim—in fact, he disavows any such claim[1]—that a state may not limit the grant of free textbooks to use in public schools. He contends, however, that the effect of the decision sought to be reviewed here is to permit or perhaps even require that textbooks be supplied for use in non-public secular schools while forbidding their use in religious schools.

There is nothing in the Oregon court's decision to support such an inference. Nothing in the record indicates that any secular non-public school has qualified as "standard" or has received any textbooks. The record shows only that books were delivered to parochial schools. The Oregon courts were therefore not called upon to decide

1. As indeed he must. Outside of Oregon only two states (Louisiana and Mississippi) authorize the expenditure of public funds for the purchase of textbooks to be used in non-public schools. *National Education Association Research Bulletin*, Vol. 34, No. 4 (Dec. 1956), pp. 186-187. New Mexico has a similar statute (N. Mex. Stat., 1941, Ann. secs. 55-1703, 1711), but in *Zellers* v. *Huff*, 55 N. M. 510 (1951), the Supreme Court of New Mexico held it violative of the state constitution to furnish free textbooks for use in other than tax supported schools.

whether or not the statute would be unconstitutional if applied to secular non-public schools.

As the opinion of the Oregon Supreme Court shows (Petition herein pp. 2a-3a)[2] the plaintiffs attacked the constitutionality on four independent grounds: (1) the establishment clause of the First Amendment; (2) the Oregon constitutional ban on aid to religious institutions; (3) the denial of due process in imposing a tax for a non-public purpose; and (4) violation of a provision in the Oregon constitution that land grant funds be used exclusively for public schools. Obviously, the third and fourth grounds are as applicable to private secular schools as they are to church schools. Until such time as the Oregon courts uphold the constitutionality of expenditures for textbooks in private secular schools petitioner can hardly claim that the decision sought to be reviewed discriminates against him.

Moreover, even if the Oregon court were to hold that expenditures for textbooks to be used in private secular schools is not constitutionally forbidden, it does not follow that petitioner is entitled to compel the State of Oregon to provide textbooks for church school use in violation of the state constitution. The Oregon court might very well hold that the statute is not severable and therefore is in-

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2. "Plaintiffs attack the constitutionality of the statute on four grounds: (1) it authorizes state aid to religion at public expense in violation of the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth; (2) the furnishing of such textbooks constitutes a benefit to religious institutions contrary to the provisions of Article I, §5 of the Oregon Constitution; (3) it, in effect, imposes a tax for a non-public purpose and thus deprives plaintiffs of property without due process of law, and (4) it authorizes the expenditure of money not exclusively for the support and maintenance of the common schools and is, therefore, in violation of Article VIII, §2 of the Oregon Constitution."

operative as to secular as well as church schools. Or it might accept the petitioner's premise and enjoin supplying textbooks to secular private schools as the only alternative to sanctioning violation of the state constitutional ban on use of public funds for religious purposes.

Whatever course the Oregon courts may take in the future, one thing is certain now: there is nothing in the record to support any inference that public funds are or may constitutionally be expended for the purchase of textbooks for use in non-public secular schools.

However, completely aside from any question of prematurity, the substance of the claim upon which the petition herein is based appears to be devoid of merit. Petitioner can hardly contend that it is unconstitutional discrimination for a state to grant tax-raised funds to secular institutions while withholding them from sectarian institutions. There is probably not a single state in the union which does not, by constitution, statute or judicial decision, forbid grant of public funds to sectarian educational institutions.[3] The decisions of this Court make it clear that the Federal Constitution forbids such grants both by the national and the state governments.[4] As this Court said expressly and unqualifiedly in *Zorach* v. *Clauson*,[5] "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian instruction . . . ."

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3. Note, "Catholic Schools and Public Money," 50 Yale L. J. 917 (1941); National Education Association Research Bulletin, Vol. 34, N. 4, p. 175 (1956).

4. *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *People ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

5. 343 U. S. 306, 314 (1952).

Petitioner can hardly contend that because of this a state may not grant funds to private secular educational institutions. The State of Pennsylvania, for example, allocates thousands of dollars each year to such private secular institutions as the University of Pennsylvania and Temple University, but none to such sectarian institutions as Villanova University and Dropsie College. Government may constitutionally engage directly in secular education and therefore may do so indirectly through the financing of secular private schools. But since it may not "undertake religious instruction or blend secular and sectarian instruction" it may not do this indirectly through financing religious institutions which do.

Petitioner's case therefore rests entirely on the proposition that the grant of textbooks for use in parochial schools in Oregon was a grant not to the schools but to the children attending it. This is the sum and substance of the petition herein, if for no other reason than that the petitioner herein is not a parochial school but the parent of a child attending such a school.

The Oregon courts, both the trial court and the Supreme Court, found that the real beneficiary of the statute is not the child but the school. This finding was made on the basis of extensive trial testimony regarding the actual operation of the statute. The evidence not only supported this finding but precluded any other. The only way petitioner herein can succeed is for this Court to declare as a matter not of fact but of constitutional law that every statute providing for free use of textbooks is and must necessarily be a grant of benefits to the children and not to the school they attend.

We cannot see how this Court can make such a declaration. Even *Cochran* v. *Louisiana State Board of Education*[6] does not intimate any such thing. There all this Court did was to accept the Louisiana court's finding that the operative effect of that state's statute was to benefit the children primarily.[7] Nothing in the Court's opinion can justify an inference that it would have disturbed a contrary finding by the state courts.

In any event, petitioner's concession that a state may constitutionally limit free textbooks to public school use makes it impossible for him at the same time to urge that it is the children rather than the school who are the beneficiaries of the state's bounty. If this were so, the state could not constitutionally discriminate against children attending non-public schools. Nor could it, as the Oregon statute does, limit the bounty to children attending "standard" schools; after all, children are children, and the fact that the school they attend is not up to "standard" is not their fault and they should therefore not be penalized for it. Indeed, such children most need and therefore are most deserving of state aid.

It is this last fact which establishes clearly that if there is to be any determination as a matter of law rather than fact, the determination must be that the schools were the intended primary beneficiary of the Oregon statute. Petitioner concedes (pp. 5-6) that the purpose of the 1941 revision of the statute imposing the requirement of "standard" was to create "an incentive for all the schools in

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6. 281 U. S. 370 (1930).

7. "Viewing the statute as having the effect thus attributed to it [i.e., by the Louisiana courts], we can not doubt that the taxing power of the State is exerted for a public purpose." *Ibid.*, p. 375.

Oregon to meet certain educational standards established by the State Board of Education." This has no meaning except if the schools are the beneficiaries of the statute, for it is they themselves and not the children who attend them who can bring themselves up to "standard."[8]

Respectfully submitted,

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STEVE ANDERSON,
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July 26, 1962.

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[8] 8. The church which operates the parochial schools involved in this suit had no doubts as to who is the substantial beneficiary of the statute. Exhibit 22, which was admitted into evidence and is part of the record, is a directive sent by Father Thielen, Superintendent of Catholic Schools of the Archdiocese of Portland, to all parish priests and principals of Catholic schools in the diocese to explain the workings of the new textbook law. On the bottom of page 3 of the exhibit, Father Thielen says: "* * * We realize that many problems have been created in the supplying of state texts for use by our students. However, we feel that ultimately the advantages will outweigh the disadvantages. In Portland alone the School District paid $10,000 for dictionaries to be supplied to parochial school students. *This is almost ten times the cost of putting the bill through the Legislature.*" (Emphasis added.)

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,

Petitioner,

vs.

OLGA ZDANOK, *et al.*,

Respondents.

ON PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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of American Spice Trade Association, California Manufacturers Association, Chamber of Commerce of the United States, Chamber of Commerce of the City of Cleveland, Ohio, Georgia State Chamber of Commerce, Illinois State Chamber of Commerce, Institute of Shortening and Edible Oils, Inc., National Association of Margarine Manufacturers, National Paint, Varnish and Lacquer Association, Inc., Ohio Chamber of Commerce and Pennsylvania State Chamber of Commerce.

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OLGA ZDANOK, *et al.*,

Respondents.

ON PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

American Spice Trade Association, California Manufacturers Association, Chamber of Commerce of the United States, Chamber of Commerce of the City of Cleveland, Ohio, Georgia State Chamber of Commerce, Illinois State Chamber of Commerce, Institute of Shortening and Edible Oils, Inc., National Association of Margarine Manufacturers, National Paint, Varnish and Lacquer Association, Inc., Ohio Chamber of Commerce and Pennsylvania State Chamber of Commerce respectfully move this Court for leave to file as *Amici Curiae* and after the expiration of the time prescribed in Rule 58(2) of this Court the annexed brief in support of the petition for rehearing of the order of this Court entered on October 9, 1961, 368 U. S. 814, insofar as it denied the petition for certiorari. The consent of counsel for the petitioner has been obtained. In view of the fact that the petition for rehearing has been filed be-

yond the time prescribed in Rule 58(2), consent of counsel for the respondents was not requested.

The various trade associations and chambers of commerce joining in this motion and the annexed brief as *amici curiae* were granted leave to file individual briefs *amicus curiae* during the 1961 Term in support of the petitioner's original application for a writ of certiorari to the United States Court of Appeals for the Second Circuit. Recent developments in this Court and other jurisdictions, which are discussed in the petition for rehearing and the brief accompanying this motion, demonstrate that the issues involved in this case are of continuing and increasing importance to these organizations whose many members are engaged in commerce and operating under collective bargaining agreements containing provisions similar, if not identical, to those involved in this case and denied consideration by this Court last Term.

Although this petition for rehearing is filed after the expiration of the time prescribed in Rule 58(2), the grounds upon which it is based arose after such time; and the Court has the power, in its discretion, to entertain the petition, *Phillips Petroleum v. Wisconsin*, 346 U. S. 934-35 (1954); *Silesian-American Corp. v. Clark*, 332 U. S. 469, 474 (1947); *Roberts Sash and Door Co. v. United States*, 282 U. S. 829-30 (1930).

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 242.

THE GLIDDEN COMPANY, DURKEE FAMOUS FOODS DIVISION,

Petitioner,

vs.

OLGA ZDANOK, *et al.*,

Respondents.

ON PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

BRIEF OF AMICI CURIAE.

This brief is being filed by American Spice Trade Association, California Manufacturers Association, Chamber of Commerce of the United States, Chamber of Commerce of the City of Cleveland, Ohio, Georgia State Chamber of Commerce, Illinois State Chamber of Commerce, Institute of Shortening and Edible Oils, Inc., National Association of Margarine Manufacturers, National Paint, Varnish and Lacquer Association, Inc., Ohio Chamber of Commerce and Pennsylvania State Chamber of Commerce as *Amici Curiae* pursuant to Rule 42(1) of this Court in support of the petition for rehearing of the order of this Court entered on October 9, 1961, 368 U. S. 814, insofar as it denied the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

The petition for rehearing assigns as reasons for this Court rehearing the petition and granting certiorari in this

case a serious conflict of authority which has developed in an area recently determined to be governed by federal substantive law. More specifically, the petition is based on a decision of this Court last Term, *Teamsters Local 174 v. Lucas Flour Co.*, 369 U. S. 95 (1962), and one of the United States Court of Appeals for the Sixth Circuit, *Oddie v. Ross Gear & Tool Co., Inc.* (6th Cir. No. 14712, 1962), which stand in irreconcilable conflict with the decision of the Court of Appeals for the Second Circuit in this case.

In *Teamsters Local 174 v. Lucas Flour Co., supra*, this Court spoke definitively for the first time on the important question of whether federal substantive law should be applied in suits involving the interpretation of collective bargaining agreements brought in state courts or, as in the present case, in federal courts where jurisdiction is based on diversity of citizenship. Contrary to the decision of the Second Circuit in the present case, this Court in *Lucas* held that federal substantive law must be fashioned and applied in these actions, as well as in suits brought under Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185, as directed in *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448 (1957).

In *Oddie v. Ross Gear & Tool Co., Inc., supra*, the Court of Appeals for the Sixth Circuit was asked to determine whether seniority rights acquired under a bargaining agreement containing a recognition clause identical in legal effect to that before the Second Circuit in the present case survived relocation of the employer's plant. Acting on the basis of this Court's decision in *Lucas* and applying federal substantive law,* the Sixth Circuit found

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* See *e.g., Local Lodge 2040, International Ass'n of Machinists v. Servel*, 268 F. 2d 692 (7th Cir. 1959), *cert. den.*, 361 U. S. 884 (1960); *System Federation No. 59 of Ry. Employees v. La. & A. Ry. Co.*, 119 F. 2d 509 (5th Cir. 1941).

no merit to the contention that seniority rights were "vested rights" which could not be cut off or defeated by relocation of the employer's plant. Your *amici curiae* submit that the conflict thus created in this important area of federal substantive law is one which requires resolution by this Court.

For the reasons set forth in the petition for rehearing, which are hereby adopted by these *amici curiae* as part of this brief, and for the reasons set forth in the briefs previously filed by these *amici curiae*, it is urged that the petition for rehearing be granted and that a writ of certiorari be issued to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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